

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
WHITBECK, P.J., and SMOLENSKI and COOPER, J.J.

PAUL DRESSEL and
THERESA DRESSEL,

Plaintiffs-Appellees,

Supreme Court
Docket No. 119959

vs.

AMERIBANK,

Defendant-Appellant.

THE MICHIGAN LEAGUE OF COMMUNITY BANKS'
AMICUS CURIAE BRIEF
IN SUPPORT OF APPELLANT AMERIBANK

HOWARD & HOWARD ATTORNEYS, P.C.

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STATEMENT OF RELIEF SOUGHT

The Michigan League of Community Banks (the “League”) supports AmeriBank’s appeal of the decision and order of the Court of Appeals dated August 3, 2001, reversing the decision of the Circuit Court for Kent County of July 12, 1999. The League supports AmeriBank’s request for reversal of the Court of Appeals’ decision and reinstatement of the judgment of the Circuit Court dismissing the action.

QUESTIONS PRESENTED FOR REVIEW

The League accepts and adopts the questions presented for review as stated in the Brief on Appeal filed by AmeriBank.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

The Michigan League of Community Banks adopts the Statement of Facts and Material Proceedings of AmeriBank in Brief on Appeal.

ARGUMENT

I. STANDARD OF REVIEW

The Court of Appeals' decision is reviewed *de novo*. *Jackhill Oil Co v Powell Production Inc*, 210 Mich App 114; 532 NW2d 866 (1995). An order of summary disposition under MCR 2.116(C)(10) is reviewed in the appellate court based on available pleadings, affidavits, depositions and other evidence viewed in the light most favorable to the nonmoving party, with the court determining whether the moving party was entitled to judgment as a matter of law. *Unisys Corp v Commissioner of Ins*, 236 Mich App 686; 601 NW2d 155 (1999).

II. INTEREST OF AMICUS CURIAE

A. Who the League Is

In 1887, building and loan associations formed the League to assist in the development of a state law for the chartering and regulation of building and loans. Since its origination, the League has represented the interests of financial institutions specializing in residential real estate finance within the state of Michigan.

Members of the League are predominantly federally chartered savings banks and savings and loan associations and state savings banks which are commonly referred to as thrifts. The League's membership, therefore, is primarily comprised of members whose legally mandated mission is to provide financing to assist in maintaining and increasing home ownership. The industry in which they conduct most of their business is the residential mortgage market.

B. The Residential Mortgage Market – The Impact of the Secondary Market

The residential mortgage market is dominated by a secondary market where mortgages are sold by originators to entities which pool them and sell interests in them to investors. Since 1984, the total secondary market has grown from \$84.4 billion to \$565.6 billion. See Fannie Mae, “A Statistical Summary of Housing and Mortgage Finance Activities”, 2001 at Table 15¹ (hereafter, “Fannie Mae Statistics”). This secondary market is dominated by three players originally chartered by the federal government: Federal National Mortgage Association (“Fannie Mae”), Government National Mortgage Association (“Ginnie Mae”), and the Federal Home Loan Mortgage Corporation (“Freddie Mac”). Of these three, Fannie Mae and Freddie Mac were eventually authorized to purchase conventional mortgage loans from originators. These organizations obtained funds for the purchase of such loans by selling securities representing interests in their pools of loans and by other debt offerings.

One of the policy objectives for creating the secondary market was to permit capital from one area of the country to be used in other areas. Prior to the creation of the secondary market, fast growing areas experienced capital shortages outstripping the funds deposited in local depository institutions such as thrifts. Other areas may have experienced surplus in capital available for mortgage lending. See, e.g., Schill, Michael H., *The Impact of Capital Markets on Real Estate Law and Practice*, 32 J. Marshall L. Rev. 269, 280 (Winter 1999) (hereafter “Schill”). With the development of a secondary mortgage market, financial institutions became more willing to make mortgage loans.

¹ Fannie Mae has made these statistics available at their web site, www.fanniemae.com. It lists as the primary source for its statistics the Department of Housing and Urban Development’s Survey of Mortgage Lending Activity. A copy is attached to this brief.

Smaller institutions could access capital from other parts of the country by selling their loans to Fannie Mae or Freddie Mac.

The increase of capital available to fund mortgage loans also contributed to the reduction of mortgage interest rates. *Schill* at 280. Obviously, the greatest benefits accrued to consumers in areas where capital might otherwise have been scarce.

Consumers are not the only ones to benefit from the secondary mortgage market. Financial institutions also have benefited by having a system that protected them from the problems associated with changes in interest rates. In the past, when financial institutions retained their mortgages, they experienced significant risk when interest rates rose. Having made fixed rate loans at lower rates, in a rising interest rate environment, they paid more in interest to depositors than they received. If, to prevent such problems, they accessed fixed rate money through term borrowing, they were at risk in a market in which rates declined. Home owners would then refinance their loans at lower rates leaving financial institutions with less revenue to pay their fixed rate debt, most of which contained prepayment penalties if paid off too soon. The secondary market relieved financial institutions from these concerns. Mortgage lenders now can sell mortgages shortly after they are made, passing the interest rate risk on to the secondary market.

While interest rate and credit risks are passed through to the secondary mortgage market, lenders originating loans retain some liability. Fannie Mae and Freddie Mac expect loans to be originated in accordance with laws. Violations, therefore, fall first upon originators. This can have a significant impact upon thrifts. Because of the secondary market, many thrifts originate loans in numbers far greater than would have

been possible had such loans been funded by deposits and required regulatory capital. Therefore, any losses resulting from violations of law made in originating these loans can easily deplete the capital of these thrifts.

Thrifts do not earn revenue from holding mortgages. They earn revenue in one of two ways. Revenue is made from any premiums from sales to Fannie Mae and Freddie Mac. However, given the dominance of Fannie Mae and Freddie Mac in the secondary market, the margins achieved on such sales are often small. Revenue is also earned from fees. Of course, any revenue is reduced by expenses incurred in originating loans. If expenses cannot be recovered, there is a major impact upon income and the ability of thrifts to continue to originate loans for sale in the secondary market.

These features of the secondary market demonstrate why the decision of the Court of Appeals is of utmost importance to the League and its members. Like all thrifts selling to Fannie Mae, thrifts in this state work to comply with all laws in originating loans. They have relied in good faith upon the legislatively sanctioned right to charge any fee agreed to by the borrower.² No doubt, some thrifts even sought legal counsel in this state regarding the right to charge a document preparation fee. In any event, none could have been prepared for the Court of Appeals' ruling which essentially imposes great liability for passing on the expense of originating the loan by charging a "document preparation fee."

² The secondary market has permitted a variety of lenders to enter into the field and thus, there is every reason to let the market determine fees. For example, one no longer needs deposits to fund mortgage loans. Thus, in 1984, savings and loans made \$109.3 billion in mortgage loans compared to only \$48 billion by mortgage companies. In 1997, savings and loans increased such amount to \$135.7 billion. Mortgage companies, however, now account for \$505.3 billion. *See Fannie Mae Statistics, Table 8.* The intense competition prevents anyone from charging anything but a market fee.

None of the thrifts could have expected a ruling that passing on document preparation fees was the practice of law. As discussed below, there is no room for legal discretion in processing these documents and, thus, no opportunity to practice law.

C. Standardization: The Key To A Successful Secondary Market

Virtually all residential first mortgages today are written on Fannie Mae/Freddie Mac forms. These forms were first developed in 1972 after Fannie Mae and Freddie Mac obtained comments from both the industry and consumer representative groups. *See* Greely, Henry T. *Contracts as Commodities. The Influence of Secondary Purchases on the Form of Contracts*, 42 Vand. L Rev 133, 148 (January, 1989) (hereafter, "Greely"). Standardization helped the secondary market to grow by reducing the costs associated with reviewing each lender's forms and eliminated the differences in rights and risks invariably involved in a multitude of forms. *Greely, Id.* Consumers have benefited greatly from this process. Today, few buyers of homes can afford the additional cost of hiring counsel in connection with the purchase of homes. Consumers no longer perceive any additional value from hiring lawyers in what has become a standardized transaction and empirical evidence exists that their perception is correct. *See e.g.,* Palomer, Joy, *The War Between Attorneys and Lay Conveyances – Empirical Evidence Says "Cease Fire,"* 31 Conn L Rev 423 (Winter 1999) (hereafter "Palomer"). Consumers have received the benefits of consumer representation in the development of Fannie Mae and Freddie Mac forms. They would not have similar representation if lenders hired attorneys to prepare their own forms.

The use of Fannie Mae/Freddie Mac forms for sales to Fannie Mae/Freddie Mac resulted in a virtual requirement that all residential mortgage loans be written on such forms, whether or not loans were sold immediately to these organizations. Lenders adopted these forms to preserve their ability not only to later sell to these organizations, but to any other purchaser. Other organizations buying loans saw the merit in standardization, and even mortgage pools created by entities other than Fannie Mae or Freddie Mac began requiring the use of these forms. *Greely, supra* at 149.

These forms have eliminated any need for a lender to seek an attorney to close a transaction. The forms simply may not be changed, and attorneys representing lending institutions do not even attempt to change them. *Schill* at 284. If a buyer's attorney were involved, he or she also would be unable to negotiate terms in these forms because changes would render the form unsaleable in the secondary market and the mortgage lender would not make a loan. *See Palomer*, at 442.

D. The Vital Public Interest

The value of increasing home ownership has never been questioned. The success of increasing such ownership has been tied to the availability of loans. Few Americans have the wherewithal to pay cash for their homes.

Congress, in creating Fannie Mae and Freddie Mac, acted to ensure the availability of funds to finance home ownership by permitting and encouraging a secondary market. Thrifts, such as the League's members, have played an important role in this mission by originating loans and accessing the capital made available from all parts of the country. In doing so, they have written a greater volume of loans than

previously possible. To do this, they must be able to rely upon the laws enacted in various states and the certainty that in following them they will not face huge exposure.

The Michigan Legislature, through the Credit Reform Act, MCL 445.1857(1), gave depository institutions the right to charge any fee that a borrower agrees to pay. The Appellate Court's ruling crafts an unexpected exception to this permission. A fee entitled "documentation preparation" is now deemed unlawful as the unauthorized practice of law. This result is unexpected because in no event can the processing of the papers for loans be deemed to involve legal discretion or advice. It is also unexpected in that depository institutions could obtain the same fee by charging for the cost of processing the loan in another way. The fee rendered unlawful could have been part of any general processing or origination fee (including "points") and would not have been subject to question.

The Credit Reform Act sought to protect depository institutions from suits such as the one brought by plaintiffs. By authorizing all fees a borrower might agree to pay, the Act should have eliminated any class actions based on the lawfulness of fees. Such a goal is meritorious in insulating deposit insured institutions from hungry class action plaintiffs.

What constitutes the practice of law has never been precisely defined. What constitutes the practice of law is typically determined on a case-by-case basis, where public injury is considered and weighed. In this case, public injury comes from the Plaintiffs' claim. By crafting an exception to the Credit Reform Act, the Appellate Court tossed out the protection the Legislature granted to depository institutions and exposed them to serious liability. In return, no public interest was served. Defining the practice

of law does not require such a result. The public interest in protecting depository institutions in relying upon statutes is great and such interest should not be defeated by requiring depository institutions to determine on a case by case basis what constitutes the practice of law. Where no legal discretion has been involved, no violation should occur, and depository institutions should not be condemned for activities that do not involve such discretion.

III. MORTGAGE LENDERS ARE ENTITLED TO THE PROTECTION OF SECTION 7 OF THE CREDIT REFORM ACT.

Thrifts originate volumes of mortgages that may exceed both their deposits and capital. Congress encouraged the secondary market in order to encourage this activity. Thrifts largely make revenue from small premiums upon sale and from fees. Once loans are sold, unless serviced by the thrift, no further revenue is earned. Problems in originating mortgage loans, therefore, can prove disastrous for thrifts, especially smaller ones. The liabilities may be disproportionally high in relation to their size and capital, and to their expected revenue stream.

Originators, therefore, must take care in reviewing applicable state law. As to the legality of fees, the Michigan legislature appeared to have eliminated any concern that a thrift might make a mistake. On its face, Section 7 of the Credit Reform Act appears to authorize all fees that a depository institution may charge:

Section 7 (1) In addition to the interest or finance charges that are authorized under Section 4, a depository institution may charge, collect, and receive from a borrower or buyer all fees and charges that are agreed to or accepted by the borrower or buyer including those relating to making, closing, processing, disbursing, extending, committing to extend, readjusting, renewing, collecting payments upon, or otherwise servicing an extension of credit or any occurrence or transaction related to an extension of credit. MCLA 445.1857.

The only limitation upon the right to charge a fee is that a fee may not be an "excessive fee or charge." An excessive fee or charge is defined by Section 2 of the Act as a fee that exceeds the amounts authorized by the Act or any other applicable law. No other law appears to place a limit on depository institutions for the fee at issue in this case. The Credit Reform Act defines "excessive" in terms of amount, not in terms of the nature of the activity for which a fee is charged.

The Court of Appeals' decision makes fees for document preparation illegal by circular logic. The fee, in the Court's view, was "excessive" because the cost of document processing was passed on to the borrowers, making it the illegal practice of law. The Court of Appeals found it important that the document preparation fee was passed on to the borrower, deducing from that fact that the borrower was being charged for "legal services" in having clerks obtain the necessary transactional information, filling it in the blanks in standardized forms and assuring the completeness and accuracy of these forms. The unstated assumption of the Court of Appeals' holding is that the same work would not be practicing law if no fee were charged.

Most costs associated with the initiation of a mortgage loan are passed on to the borrower. If a survey needs to be done, the lender passes on that fee at the closing. It does not make the lender a surveyor. Similarly, if a lender requires that a termite inspection be done, the cost of that service is passed on to the borrower. The fees for recording the deed and the mortgage are passed on to the borrower. A thrift could arrange to have all these things done itself, lump them together and recover its costs for processing the loan by charging additional "points" within legal limits. Apparently, that would avoid the Court of Appeals' concern about the unauthorized practice of law.

However, the substance of the transaction would remain unchanged. The forms themselves would not change. The consumer would receive no additional protection from the "unauthorized practice of law" or any financial benefit. The Court of Appeals' decision exalted form over substance in a way detrimental not only to mortgage lenders but, ultimately, future borrowers.

The documents needed to close a mortgage loan do not prepare themselves. Staff has to be hired to do the work. That represents a cost to the lender. If the lender can't recover these costs directly, it will, in order to stay in business and keep lending money, have to recover them indirectly, even if it means charging a higher interest rate on the loan so that it will be worth more in the secondary market and command a slightly higher premium.

Document preparation fees are specifically allowed in other contexts. For example, a "document preparation fee" not to exceed \$40.00 is specifically allowed by the Motor Vehicle Sales Act. MCL 492.113(2) ¹³ If the logic of the Court of Appeals' decision were applied to the Motor Vehicle Sales Act, the document preparation fee specifically authorized by statute could not be collected. It would be the unauthorized practice of law. It would be preparing documents necessary to transfer legal title to a motor vehicle and/or to prepare a sales/finance contract. The Court of Appeals' rationale would uphold the amount of the fee as proper but prohibit charging the fee itself because filling out the forms necessary to transfer title to a car could be regarded as the "practice

³ The number of documents prepared by a mortgage loan originator far exceeds the number prepared by a car dealer. AmeriBank's brief enumerated these documents, many of which are disclosure documents whose form is mandated by law. For non-depository institutions, a processing fee of up to 2% of the amount of credit is authorized. On a \$100,000 loan, this would be a fee of \$2,000 for processing the loan.

of law" for which the consumer was charged and, therefore, illegal. This would be an absurd result. As discussed below, document preparation simply is not the practice of law when (1) one is merely filling in data and (2) the one filling in the data is a party to the transaction.

Before turning to these two points, however, the League cannot overstate the necessity for this Court to consider the good faith reliance of depository institutions upon Section 7 of the Credit Reform Act. Depository institutions have understandably read this Act as authorizing all fees a borrower agreed to pay. That is what the Act says. The competitive market is the only cap upon fees. The existence of other legislatively sanctioned document preparation fees, like that found in the Motor Vehicles Sales Act, coupled with the plain language to the Credit Reform Act, leads directly to the logical conclusion that a separately labeled fee for document preparation would not be a violation of law. The Court should not frustrate that reasonable expectation, especially retroactively.

Section 7 appears to foreclose all possibility of challenging depository institution fees which have been disclosed and agreed to by borrowers. One might even wonder if the Legislature passed Section 7 to protect the very institutions involved from class action litigation of this type. After all, all citizens are concerned about the solvency of deposit insured banks, not only as consumers who, through bank pricings, share the cost of insurance premiums to the FDIC, but also as taxpayers who have borne the cost of bailing out savings and loans once before.

The League does not advocate that Section 7 allows depository institutions to practice law. Rather, the League questions whether the labeling of an authorized fee as a

document preparation fee could reasonably lead to the conclusion that one is practicing law by passing on actual costs involved in lending money. Courts have recognized that drawing the line for when an activity constitutes the practice of law is difficult. Drawing that line involves many public policy questions, the chief of which is protecting the public. In this case, no public injury arises from the acts challenged here.

The plaintiff asks this Court to draw the line merely because a document preparation fee is charged. Yet, the plaintiff offers no rationale for how such a line would protect the public. From the perspective of depository institutions, drawing such a line results in grave public injury. Given Section 7 and other legislatively recognized “doc prep” fees, depository institutions in good faith have charged these fees. They did so not merely as money making devices, but to recover expenses from originating loans in a market where margins for selling them are low. Unless some public interest is found, finding depository institutions to be engaging in the practice of law merely because of the name of the fee serves no useful purpose and deprives depository institutions of the protections afforded in Section 7 of the Credit Reform Act.

IV. SCRIVENERS ARE NOT LAWYERS.

Blacks Law Dictionary, Fifth Edition, defines “scrivener” as:

A writer; scribe; conveyancer; one whose occupation is to draw contracts, write deeds and mortgages, and prepare other species of written instruments.

The same dictionary defines “lawyer” as follows:

A person learned in the law; as an attorney, counsel, or solicitor; a person licensed to practice law. Any person who prosecutes or defends causes in courts of record or other judicial tribunals of the United States, or of any of the states, or whose business it is to give legal advice or assistance in relation to any cause or matter whatever.

The decision of the Court of Appeals makes scriveners lawyers and lawyers scriveners. Copies of forms routinely and regularly used in residential mortgages are attached to this brief. Any lender regularly making residential loans is, practically speaking, obliged to use these "Fannie Mae/Freddie Mac" uniform instruments. Any legal thought, advice or counseling involved in the drafting of these forms went into their original creation, not into filling in the blanks on them. The loan officer is not drafting legal language; he or she is collecting data necessary to complete the form.

The uniform mortgage has a blank for the name and address to whom the recorded document should be returned. It has blanks for filling in the date of the document, the name and address of the borrower, the name, address and state of organization of the lender, the dollar amount of the loan and boxes to check for form riders (none of which are attached to this brief). Of course, there is a space for insertion of the legal description of the property. This is usually obtained by copying the description contained in the commitment for title insurance protecting the mortgage. It must be accurate. Time has to be taken to make the entry on the form and compare it to the description on which it is based for accuracy.

The Legislature has provided for statutory forms of warranties and mortgages. See MCL 565.151, MCL 565.152 & MCL 565.154. If filling out standard forms is "practicing law," it stands to reason that it is practicing law whether a fee is charged or not. Application, therefore, of the Court of Appeals' holding to its fullest extent means that when unrepresented parties buy or sell land, one of the two parties to the transaction is practicing law by filling out a deed or a mortgage in the form designated by the

Legislature. That is a manifestly absurd result. This Court should reverse the holding that permits it.

The Court of Appeals' decision is clearly erroneous because it amounts to a holding that the clerical effort required to accumulate the nonlegal information to fill in the blanks of previously prepared uniform forms amounts to the practice of law. Letting that decision stand will open up countless financial institutions to endless litigation over loans already made in which full disclosure of all fees and charges was made, without protecting the public in any way from faulty legal advice.

Lawyers frequently fill out notes and mortgages. However, not everything lawyers do amounts to practicing law. The preparation of tax returns is not "legal advice." *US v El Paso Co*, 682 F2d 530 (5th Cir 1982) *cert den* 466 US 944; 80L Ed 2d 473; 104 S Ct 1927 (1984). "Legal advice" within the meaning of the attorney-client privilege, at least, means giving an opinion of law or rendering legal services or assistance in a legal proceeding. *Boller v Barulich*, 557 NYS2d 833 (1990).

None of the information filled in on the attached forms amounts to "legal advice," "opinion," or, for that matter, a representation on legal issues. These are required forms and there are no alternatives. Lenders, such as the members of the League, are, practically speaking, unable to make residential mortgage loans using any other forms or to alter these forms because the loan would then not be marketable.

If a lender were to hire an attorney, he or she would have no constructive role to play in the lending process. The loan originator would still collect all the information and provide it to the attorney. The loan officer would still do all the work but the insertion in the blanks. The lender could still charge a fee for the loan originator as a

processing fee and could also pass along the costs of the attorney. Under the rationale of the Court of Appeals, this would be permissible. Yet, it gives no benefits to the borrower and results in the borrower paying higher costs. The forms stay the same.

The common sense, direct, well researched and rationale approach of Judge Kolenda in granting AmeriBank summary disposition on the “practice of law” question was not dealt with directly by the Court of Appeals. The cases and authorities he cited recognized the practicalities of this situation and have not been adequately distinguished. It is appropriate for the Supreme Court to reverse for the reasons stated in Judge Kolenda’s opinion of July 2, 1999. With respect to what was actually done in the case at bar (and in the routine mortgage loans made by the League’s members on a daily basis), preparing these fill in the blank forms did not, as Judge Kolenda noted, involve giving legal advice. At page 4 of his opinion, he correctly said:

Plaintiffs do not contend that defendant does anything related to the management and/or presentation of a case in court. Nor do plaintiffs claim that defendant gives any legal advice. Instead, defendant only completes standardized forms by filling in the blanks. It does not assess the legal effect of the information placed therein, nor does it give any advice regarding those documents or their effects. Hence, because no legal training or knowledge are necessary, defendant does not practice law by preparing those documents. That a fee is charged does not transmogrify that activity into the practice of law.

Judge Kolenda’s review of *State Bar of Michigan v Cramer*, 399 Mich 116 (1976), *Grand Rapids Bar Assn v Denkema*, 290 Mich 56 (1939), *Detroit Bar Assn v Union Guardian Trust Co*, 282 Mich 216 (1937) and other authorities summarized, as well as the League could do in this brief, the reasons why filling in the blanks on forms used in a mortgage loan transaction does not amount to “practicing law.” The following

excerpts from his opinion at pages 3 and 4 correctly state the law with respect to the practice of law and ought to be adopted by this Court:

When deciding in a particular case whether certain conduct constitutes the practice of law, the courts have ‘to accommodate the need for public protection through restricting the practice of law to members of the bar with the economic and practical realities of modern society.’ *Cramer, supra*. That, too, is a formidable task. If defined too expansively, business activities could be paralyzed with the unfortunate result ‘that very few transactions could be expeditiously consummated.’ *Id., quoting State ex rel Indiana State Bar Assn v Indiana Real Estate Assn*, 244 Ind 214, 221-222; 191 NE 2d 711 (1963). If, on the other hand, what constitutes the practice of law is defined too narrowly, individuals and corporations would often be poorly represented in complex transactions having major ramifications because the advice given them would be without the benefit of legal training and without the relationship of confidence and trust so necessary to proper representation in legal matters. *Cramer, supra*, at 136- 137.

The practice of law does not, on the other hand, encompass drafting ‘the ordinary run of agreements [used] in the everyday activities of the commercial and industrial world.’ *Detroit Bar Assn, supra*, at 229. Legal training and knowledge are not necessary to properly compose them. Drafting simple documents, which drafting does not entail giving advice or counsel as to their legal effect and validity, is not the practice of law. *Denkema, supra*, at 66. Specifically, the preparation of ordinary leases, mortgages and deeds do not involve the practice of law. *Ingham County Bar Assn v Walter Neller Co*, 342 Mich 214, 226, 227 (1955). They have become ‘so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training.’ *Id.*, at 224, quoting *Hulse v Criger*, 363 Mo 26, 44; 247 SW 2d 855 (1952). To insist that only a lawyer can draft such documents would impede business transactions without protecting the public, *Id.*, at 229, i.e., would not further the purpose of restricting the practice of law to trained and licensed attorneys. *Cramer, supra*, at 133.

Under the Court of Appeals’ decision, the fee charged for the preparation of a note and mortgage becomes the pea in a shell game. If after all the shells are moved around, the pea shows up under the correct one, the borrower pays the cost and the lender is innocent and blameless. If the pea doesn’t show up under the shell picked by the court, the lender acted improperly and, under plaintiffs’ class action scenario, owes millions of

dollars. Because there is no principled reason underlying any of the authorities relied on by the Court of Appeals or, for that matter, the decision of the Court of Appeals, its decision is clearly erroneous. The existence of many pieces of litigation raising exactly the same issue is, by itself, an indication that the practice here challenged is one of long standing and is wide spread. It has become an established, customary way of dealing with mortgage lending. A significant, *ex post facto* change of the rules governing residential mortgage loans is not only of major significance of the jurisprudence of the state, it is of major significance to lenders and to future borrowers, who, as a practical matter, will have to assume any costs imposed on existing institutions by loans previously made.

V. PROHIBITING CHARGING A SPECIFIC FEE FOR DOCUMENT PREPARATION SERVES NO PUBLIC PURPOSE.

No organization of lawyers can long survive which has not for its primary object the protection of the public.

Roberts P. Hudson, First President of the State Bar of Michigan.

Presumably, the Michigan legislature has banned the unauthorized practice of law for the protection of the public, not to insure income for a well connected guild. If the rationale behind the Court of Appeals' decision and the decisions cited in its opinion for prohibiting the charging of a separate fee for completing blanks mortgage forms was to assure that the public would be protected from incompetent legal advice, then the opinion is internally inconsistent and devoid of logic. It would permit getting the same "advice" either for no fee at all or for a disguised fee that would be recovered through a higher rate of interest on the loan or by labeling the fee as a processing fee. If filling out standard

forms is "practicing law," if a fee is charged, why is it not "practicing law" if the lender absorbs the cost or recovers it indirectly?

If the rationale behind the decision was to protect the incomes of lawyers who might otherwise be able to charge for having their clerical staff, instead of the clerical staff of lending institutions, fill in the blanks in standardized forms, then rules designed to protect the public generally have been distorted to protect "professionals" who are most specially not in need of special protection, i.e., lawyers.

The Court of Appeals relied upon a number of authorities, none of which were binding upon it either because they came from other jurisdictions, involve dicta or involve facts distinguishable from the case at bar. The grave public policy concerns involved in this case require this Court to review the facts unique to the nature of this case, not merely to mechanically apply "realtor" cases.

The Court of Appeals admitted in its decision that "Michigan case law has yet to declare specifically that charging a separate fee for the preparation of legal documents by a banking institution constitutes the unauthorized practice of law." The Court, therefore, turned to two cases from other jurisdictions, *Miller v Vance*, 463 NE2d 250, 253 (Ind 1984) and *Cain v Merchants Nat'l Bank & Trust Co of Fargo*, 6 ND 746; 268 NW 719 (1936). Notably, both these cases occurred before the boom in the secondary market. *Cain* even arose before Fannie Mae and Freddie Mac ever purchased conventional loans, and thus, the standardized forms used today were not in issue.

Michalowski v Flag Star Bank FSB, 2002 US Dist LEXIS 1245 (ND Ill, January 25, 2002) (attached) concluded that "merely preparing the mortgage documents . . . without more does not constitute the practice of law," citing *First Federal S & L Assoc v*

Sadnick, 515 NE2d 1354, 1356 (162 Ill App 3rd 581, 583, 3d Dist 1987). Application of the Illinois rule to this case would yield a sensible.

Because this is a case of first impression, this Court can decide whether these cases should become the law in this state. In doing so, the Court needs to consider what public benefits are served. Are borrowers protected by the holding of the Court of Appeals in any fashion? Does the Court of Appeals ruling simply result either in depository institutions disguising the fee in other fees or hiring attorneys and passing on higher costs? If the latter is true, it serves no public purpose to impose tremendous liability on depository institutions for past mortgages. The depository institutions collected no fees they could not otherwise have collected had they used a different name.

Of course, the Court of Appeals did not rely solely upon cases from other jurisdictions, but also reviewed cases in Michigan arising in other contexts. The brief of AmeriBank on this matter more than adequately addresses the fact that most of their cases dealt with the issue of charging a fee only in dicta.

The League, however, is more concerned that the Court of Appeals failed to consider that AmeriBank's business differs dramatically from realtors and from claims agencies. The key difference is that in those industries the documents being prepared contain legal rights "benefiting others." In this case, the legal rights in the note and mortgage are in major part for the benefit of the lender, a party to the transaction.

This is not merely a *pro se* issue, although the lenders should win on that argument as well. It goes directly to the question of whether charging a fee constitutes the practice of law

In *Bay County Bar Ass'n v Finance System, Inc.*, 345 Mich 434; 76 NW2d 23 (1956), this court considered whether a claims agency could file suit to collect claims and retain a portion of the outcome. This case did not turn on the existence of a *separate* fee. The agencies retained a portion of the collection, whether or not a suit was needed. In fact, the Court assumed a "portion of the compensation" was for the services. This Court found the practice to be the unauthorized practice of law even where the fee was not separate. In reality, the problem was that non-lawyers appeared in court, not merely for themselves, but for the principal on whose behalf they were collecting. Bringing a suit and appearing in court is unquestionably the practice of law. The principal's recovery was affected by the skill employed. This Court first made the conclusion that legal advice and services were being furnished to others. Had this been done gratuitously, the court should have had a problem with the conduct regardless of the compensation.

Similarly, cases involving realtors are not analogous to this case. A realtor is not a party to the deed or the sale. Nor does a realtor receive the benefits of a title commitment. This benefit goes entirely to the buyer. A buyer who foregoes counsel in this situation foregoes legal advice as to whether the deed should be made to him and his wife as joint tenants or whether an exception in the title commitment is a problem. A realtor who charges a fee in this instance may mislead the buyer into believing he has received appropriate advice in this matter.

In a mortgage loan transaction, the borrower has no reason to believe that he or she is purchasing legal advice. Moreover, the borrower loses nothing by foregoing an attorney. As previously discussed, borrowers' attorneys do not make changes to these forms because doing so would render the loans unsaleable.

No public interest is preserved by mechanically adapting cases with different facts to the situation here. The cases cited by the Court of Appeals did not find an unauthorized practice of law simply because a fee was charged. The results were reached because the practices involved in those particular instances raised concerns. None of these cases established the principle that the Court of Appeals established, i.e. prohibiting “engaging in a business where a profit is made from manufacturing legal documents without the requirement of licensure from the state bar.”

The Court of Appeals even erred in applying facts to its own announced principle. These forms were manufactured not by the lenders, but by Fannie Mae and Freddie Mac after consultation with lawyers. It is simply not the case that lawyers had no role in the preparation of these documents.

The unauthorized practice of law rule is designed to protect the public, not to preserve profits for a select group of individuals. Regulation to protect the public is one matter. Regulation to preserve an attorney monopoly is anticompetitive, as the U.S. Justice Department has previously warned some associations. *See, e.g., Palomer*, at pages 471-474.

Lawyers perhaps understand better than the general public the purposes of regulating the practice of law. Laymen may not fully appreciate the degree to which document selection and word smithing can affect seriously legal rights. Thus, correctly, the determination of what constitutes the practice of law has been left to the courts. Still, courts must also recognize the tendency of any profession to desire to monopolize and control the field, not necessarily for the public’s own benefit, but for the economic concerns of the profession. Thus, the Court should not be concerned as to whether any

element of society other than lawyers earns a fee for “preparing” documents. Rather, this Court should focus on whether the activity involves situations in which the public needs protection. No such situation occurs here merely because a fee is charged.

VI. PREPARATION OF LOAN DOCUMENTS IS INCIDENTAL TO A LAWFUL BUSINESS ACTIVITY.

The Court of Appeals concluded that charging a fee for loan document preparation fell outside the *pro se* exception because the fee was passed on to the borrower. However, the preparation of the documents and recoupment of a fee for preparing them was incidental to the lawful activity of AmeriBank, just as it is incident to the lawful activities of the League’s members. Making mortgage loans is what they do. Whether chartered federally or by the state, mortgage lenders have the power to make and/or arrange loans, including loans secured by a lien on real property. MCL 487.3401 and 12 USC 1464(c)(1)(B). The statute of frauds prohibits the making of a loan orally. These transactions require documents. There cannot be a more striking example of activity that is incidental to a lawful business of making mortgage loans than preparing mortgage loan documents.

Illinois follows this rule. *See, Michalowski v Flag Star Bank FSB*, 2002 US Dist LEXIS 1245 (ND Ill, January 25, 2002), *supra*, at page 18.

Judge Kolenda relied on *Ingham County Bar Assn v Walter Neller Co*, 342 Mich 214, 222-227 (1955). The net effect of that case was to hold that real estate brokers may prepare deeds, land contracts and *mortgages* in connection with real estate transactions handled by them. The reason is that the preparation of these documents was incidental or ancillary to the business of real estate practitioners. It is similarly incidental or ancillary to an essential part of the business of a lending institution making mortgage loans.

The various statutes and cases holding that title companies and realtors can prepare mortgages and other documents related to real estate transactions, or that banks can prepare them without charging a fee, is a plain indication that preparation of these documents is not “practicing law” but, instead, the preparation of documents necessary to a transaction in which title companies, real estate brokers and mortgage lenders are routinely and lawfully engaged.

If preparation of these documents was practicing law, then permitting entities to prepare them for “free” would still be practicing law. Practicing law *pro bono* is still practicing law.

VII. THE MICHIGAN CONSUMER PROTECTION ACT DOES NOT APPLY.

The League supports and adopts the legal argument presented by AmeriBank on the Michigan Consumer Protection Act. Rather than reiterate the same arguments and rely on many of the same legal authorities, the Michigan League states simply that AmeriBank has correctly pointed out the circularity of the Court of Appeals’ ruling. In saying that the exceptions to the Michigan Consumer Protection Act did not apply to AmeriBank, it held, in essence, that the fee charged was unlawful because it was excessive and excessive because it was unlawful. Because filling in blank forms is not practicing law, the Court of Appeals’ analysis fails. The Michigan League urges the Supreme Court to grant leave, adopt Judge Kolenda’s opinion and summarily reverse the decision of the Court of Appeals.

CONCLUSION AND RELIEF REQUESTED

The Michigan League of Community Banks respectfully requests that the Court reverse the Court of Appeals and adopt Judge Kolenda's well reasoned opinions of July 2, 1999 (granting AmeriBank summary disposition) and September 3, 1999 (denying plaintiffs' motion for rehearing as the law).

Respectfully submitted,

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A Statistical Summary of Housing and Mortgage Finance Activities

2001

Next

Measures of Mortgage Market Activity

The following tables present an historical summary of housing, primary mortgage market, and secondary mortgage market activity.

The primary source for data on whole loan originations is the Department of Housing and Urban Development's *Survey of Mortgage Lending Activity* (SMLA). This survey samples lending institutions and agencies representing approximately 95 percent of the industry. Beginning in 1990, HUD made changes to the mortgage banking portion of the survey in order to improve the quality of the data, and subsequently revised data for 1985-1989 to be comparable to the new survey data. The mortgage company survey was revised for a second time and completely restructured in response to further problems associated with the 1991 data. Moreover, beginning in 1996, HUD made changes to the commercial bank portion of the survey in order to improve the quality of the data. Unlike the 1990 change, however, HUD made no attempt to revise previous data for consistency. For the past two years, HUD has not conducted the SMLA, and thus no data exist after 1997. Fannie Mae Economics estimates have been used where feasible.

Aggregate data on Fannie Mae, Freddie Mac, and GNMA activity have been obtained from each of the respective organizations. Freddie Mac, however, does not publish data on current versus seasoned purchases. Fannie Mae, using information from the monthly *Bond Buyer* report, estimates these figures.

Data on mortgage debt outstanding are available from both HUD and the Federal Reserve Board (FRB). Except as noted, we have used the FRB data because they are both more comprehensive and, in our judgement, more reliable. Both the Mortgage Debt Holding Group and the Flow of Funds Group at the FRB report mortgage debt outstanding, and the reported figures – while close – are not exactly the same. We report Flow of Funds data in Tables 1 and 2, and Mortgage Debt Holding Group data in Tables 3, 4, 5 and 6. Beginning in 2001, we also present data on mortgage debt outstanding by holders of both credit and interest rate risks.

Throughout the report (unless otherwise noted), "residential" mortgages include one-to-four family, multifamily, and residential construction loans. "Federal Credit Agencies" include Fannie Mae, Freddie Mac, Farmers Home Administration, and the Resolution Trust Corporation, among others.

Fannie Mae Economics
August 2001

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August 2001

Table 1
Residential Mortgage Debt Outstanding by Property Type
Billions of Dollars

<u>Year</u>	<u>Total Residential</u>	<u>1-4 Family</u>			<u>Multifamily</u>		
		<u>Total</u>	<u>FHA</u>	<u>VA</u>	<u>Total</u>	<u>FHA</u>	<u>Conventional</u>
1984	1,518.2	1,332.8	136.7	124.4	185.5	29.0	156.5
1985	1,737.5	1,532.5	153.0	130.8	205.0	39.5	165.5
1986	1,976.0	1,737.7	185.5	138.1	238.3	41.9	196.4
1987	2,197.1	1,939.4	235.2	147.4	257.7	43.5	214.2
1988	2,449.2	2,175.7	257.8	150.4	273.5	45.5	228.0
1989	2,690.4	2,404.5	281.7	152.3	285.9	46.8	239.1
1990	2,932.1	2,646.5	312.6	155.1	285.6	47.0	238.6
1991	3,096.2	2,814.5	332.8	158.2	281.7	43.9	237.8
1992	3,253.4	2,984.1	321.9	159.6	269.3	43.6	225.8
1993	3,412.7	3,146.5	305.9	162.4	266.2	43.9	222.3
1994	3,595.4	3,329.6	338.3	173.8	265.8	45.1	220.7
1995	3,784.3	3,510.6	352.3	181.4	273.7	47.2	226.5
1996	4,008.0	3,719.0	379.4	191.5	288.9	49.2	239.8
1997	4,273.4	3,971.3	406.0	199.9	302.1	50.6	251.5
1998	4,681.2	4,351.0	418.4	205.8	330.2	50.2	279.9
1999	5,148.8	4,777.1	462.0	214.2	371.7	52.7	319.0
2000	5,601.7	5,192.4	500.6	218.0	409.4	53.6	355.7

Sources: Department of Housing and Urban Development, Federal Reserve Board, Veterans Administration, Federal Housing Administration, and Fannie Mae Economics estimates.

Note: Components may not add to total because of rounding.

Table 2
Net Investment In Residential Mortgages by Property Type
Billions of Dollars

<u>Year</u>	<u>Total Residential</u>	<u>1-4 Family</u>		<u>Multifamily</u>	
		<u>Total</u>	<u>FHA</u>	<u>Total</u>	<u>FHA</u>
					<u>Conventional</u>
1984	160.6	135.8	9.3	24.8	-2.0
1985	219.3	199.7	16.3	19.6	10.6
1986	238.5	205.3	32.5	33.2	2.3
1987	221.1	201.7	49.7	19.4	1.6
1988	252.1	236.3	22.6	15.8	2.0
1989	241.1	228.7	23.9	12.4	1.2
1990	241.8	242.1	30.9	-0.3	0.3
1991	164.1	168.0	20.1	-3.9	-3.1
1992	157.1	169.5	-10.8	-12.4	-0.4
1993	159.4	162.5	-16.0	-3.1	0.4
1994	182.7	183.1	32.3	-0.4	1.2
1995	188.9	181.0	14.1	7.9	2.1
1996	223.6	208.4	27.1	15.2	2.0
1997	265.4	252.3	26.6	13.2	1.4
1998	407.8	379.7	12.4	28.1	-0.3
1999	467.7	426.1	43.6	41.5	2.5
2000	452.9	415.2	38.6	37.7	1.0
					36.7

Sources: Department of Housing and Urban Development, Federal Reserve Board, Veterans Administration, Federal Housing Administration, and Fannie Mae Economics estimates.

Note: Net Investment is defined as the change in mortgage debt outstanding between contiguous years.

Table 3
Total Residential Mortgage Debt Outstanding by Holders of Credit Risk
Billions of Dollars

Credit Guaranty										Whole Loan Holdings																								
Year	Fannie Mae				Freddie Mac				Ginnie Mae				Private Mortgage Related				State & Local				Finance				FHLB's				Life Ins.				Other	Total
	Total		Mae		Mac		Freddie		Ginnie		Mae		Mac		Freddie		Banks		Thrifts		Agencies		Credit Unions		Cos.		Mort Part.		Individuals		Companies			
1985	1,737.5	55.0	100.4	211.1	24.0	419.4	98.2	14.0	234.3	650.9	68.4	11.1	17.1	0.0	93.0	32.3	98.8	1,318.1																
1986	1,976.0	97.2	171.4	262.7	16.8	548.2	96.2	11.6	262.8	664.7	79.4	19.3	20.5	0.0	94.3	33.8	145.2	1,427.8																
1987	2,197.1	140.0	211.6	317.6	28.3	697.6	92.5	12.9	301.1	676.7	87.5	29.9	25.3	0.0	104.2	35.8	133.8	1,499.5																
1988	2,449.2	178.3	226.4	340.5	35.8	781.0	94.9	17.4	356.1	748.8	91.1	38.1	28.3	0.0	109.2	35.7	148.6	1,668.2																
1989	2,690.4	228.2	272.9	368.4	44.3	913.8	99.0	21.9	411.3	735.3	97.0	44.8	32.2	0.0	118.4	39.1	177.5	1,776.6																
1990	2,932.1	299.8	316.4	403.6	56.3	1,076.1	104.9	21.9	465.9	692.0	101.6	49.7	38.9	0.0	130.2	42.0	209.1	1,856.1																
1991	3,096.2	372.0	359.2	435.5	103.3	1,270.0	112.1	26.8	487.5	618.2	104.6	52.8	38.2	0.0	130.4	40.0	215.7	1,826.3																
1992	3,253.4	445.0	407.5	430.5	157.9	1,440.9	137.4	33.7	515.0	559.4	104.7	53.8	40.0	0.0	120.7	38.4	209.5	1,812.5																
1993	3,412.7	495.5	447.1	414.1	192.0	1,548.8	165.7	46.9	569.2	537.4	99.1	56.0	38.4	0.0	108.8	36.4	206.2	1,864.0																
1994	3,595.4	530.2	490.9	450.9	215.7	1,687.8	174.3	41.7	627.8	542.0	100.8	62.1	41.2	0.0	97.9	36.4	183.5	1,907.7																
1995	3,784.3	583.0	515.1	472.3	236.2	1,806.5	178.8	43.8	689.1	544.3	104.6	66.5	45.3	0.0	90.4	37.6	177.4	1,977.8																
1996	4,008.0	650.8	554.3	506.2	272.1	1,983.4	168.8	46.5	723.1	575.3	108.7	76.0	55.2	0.0	89.2	37.7	144.2	2,024.6																
1997	4,273.4	709.6	579.4	536.9	331.6	2,157.4	161.3	48.5	795.2	616.3	112.3	86.0	61.9	0.0	88.0	37.6	145.0	2,116.0																
1998	4,681.1	834.5	646.5	537.4	438.9	2,457.3	157.7	57.1	849.5	590.4	116.5	96.9	78.5	1.0	86.8	38.1	151.4	2,223.8																
1999	5,148.8	960.9	749.1	582.3	497.2	2,789.5	151.5	56.7	944.7	607.9	120.9	111.0	93.4	2.0	85.7	38.8	146.8	2,359.4																
2000	5,601.7	1,057.8	822.3	611.6	549.2	3,040.8	155.4	59.2	1,043.0	655.9	125.6	127.4	111.5	16.2	84.6	38.6	143.7	2,560.9																

Source: Federal Reserve Board

Note: 1. Data provided by the Mortgage Debt Holding Group at the Federal Reserve Board, which may differ from data provided by the Flow of Funds Group data are used in Tables 1 and 2.)

2. Data does not reflect credit risk held by private mortgage insurers, FHA/VA, and other third-party whole loan insurers. The data also does not reflect risk-sharing structures such as credit enhancements and equity investments. These balances are included in the totals for the institutions that hold the mortgage.
3. The "Other" category includes federal agencies, mortgage companies, REITs, state and local retirement funds, private pension funds, bank personal trusts and estates, Federal Land Banks, and other mortgage debt holders not elsewhere classified.

Table 4
Net Total Residential Mortgage Debt Outstanding by Holders of Credit Risk
Billions of Dollars

Year	Credit Guaranty					Whole Loan Holdings											Total	
	Private Mortgage Related					State & Local						FHLB's				Life Ins. Companies		
	Fannie Mae		Freddie Mac		Ginnie Mae	Securities	Total	Thrifts		Agencies		Credit Unions	Finance Cos.	Mort Part.	Individuals			
1985	219.3	18.8	29.6	31.2	13.0	93.7	10.8	3.6	20.5	45.0	9.1	3.6	2.9	0.0	19.6	-0.8	11.4	125.5
1986	238.5	42.2	71.0	51.6	-7.2	128.8	-2.0	-2.5	28.5	13.8	10.9	8.2	3.4	0.0	1.3	1.5	46.5	109.8
1987	221.1	42.8	40.3	54.9	11.5	149.4	-3.8	1.3	38.3	12.0	8.2	10.5	4.8	0.0	9.8	2.0	-11.4	71.7
1988	252.1	38.3	14.8	23.0	7.5	83.4	2.5	4.6	55.0	72.1	3.6	8.2	3.1	0.0	5.0	0.0	14.8	168.7
1989	241.1	50.0	46.5	27.8	8.4	132.7	4.1	4.4	55.2	-13.5	5.9	6.8	3.9	0.0	9.3	3.4	28.9	108.4
1990	241.8	71.6	43.5	35.2	12.0	162.3	5.9	0.0	54.6	-43.4	4.6	4.9	6.7	0.0	11.7	2.8	31.6	79.5
1991	164.1	72.2	42.8	31.9	47.0	193.9	7.2	5.0	21.6	-73.7	3.0	3.1	-0.7	0.0	0.2	-2.0	6.6	-29.8
1992	157.1	73.0	48.4	-5.1	54.7	170.9	25.3	6.9	27.4	-58.8	0.1	1.0	1.8	0.0	-9.7	-1.5	-6.2	-13.8
1993	159.4	50.5	39.6	-16.4	34.1	107.9	28.3	13.2	54.3	-22.0	-5.6	2.2	-1.6	0.0	-11.9	-2.0	-3.3	51.5
1994	182.7	34.7	43.7	36.9	23.7	139.0	8.6	-5.2	58.6	4.6	1.7	6.1	2.9	0.0	-10.9	0.0	-22.7	43.7
1995	188.9	52.7	24.2	21.3	20.5	118.8	4.5	2.0	61.2	2.4	3.9	4.4	4.1	0.0	-7.5	1.2	-6.1	70.1
1996	223.7	67.8	39.2	34.0	35.8	176.8	-10.0	2.8	34.0	30.9	4.1	9.5	9.9	0.0	-1.2	0.1	-33.3	46.8
1997	265.4	58.8	25.1	30.6	59.5	174.0	-7.5	2.0	72.1	4.9	3.5	10.1	6.7	0.0	3.5	-0.1	0.9	91.4
1998	407.7	124.9	67.1	0.6	107.3	299.9	-3.6	8.6	54.3	10.2	4.2	10.9	16.5	0.9	-1.2	0.5	6.4	107.8
1999	467.7	126.4	102.6	44.8	58.3	332.1	-6.2	-0.4	95.3	17.5	4.4	14.1	14.9	1.1	-1.1	0.6	-4.6	135.6
2000	452.9	96.9	73.2	29.4	51.9	251.4	3.9	2.6	98.3	48.0	4.6	16.4	18.1	14.1	-1.0	-0.2	-3.2	201.5

Source: Federal Reserve Board.

- Notes:
1. Net Debt Outstanding is defined as the change in mortgage debt outstanding between contiguous years.
 2. Data provided by the Mortgage Debt Holding Group at the Federal Reserve Board, which may differ from data provided by the Flow of Funds Group (Flow of Funds Group data are used in Tables 1 and 2.)
 3. Data does not reflect credit risk held by private mortgage insurers, FHA/VA, and other third-party whole loan insurers. The data also does not reflect risk-sharing structures such as credit enhancements and equity investments. These balances are included in the totals for the institutions that hold the mortgage.
 4. The "Other" category includes federal agencies, mortgage companies, REITs, state and local retirement funds, private pension funds, bank personal trusts and estates, Federal Land Banks, and other mortgage debt holders not elsewhere classified.

Table 5
Total Residential Mortgage Debt Outstanding by Holders of Interest Rate Risk
Billions of Dollars

Year	Total Mortgage Debt Outstanding			Commercial Banks			Thriffs			Fannie Mae			Freddie Mac		
	Mortgage Related			Mortgage Related			Mortgage Related			Mortgage Related			Mortgage Related		
	Whole	Loans	Total	Whole	Loans	Total	Whole	Loans	Total	Whole	Loans	Total	Whole	Loans	Total
1991	1,826.3	1,270.0	3,096.2	487.5	277.1	764.6	618.2	185.2	803.4	112.1	14.4	126.5	26.8	-0.3	26.5
1992	1,812.5	1,440.9	3,253.4	515.0	306.3	821.3	559.4	189.4	748.8	137.4	18.6	156.0	33.7	-0.1	33.5
1993	1,864.0	1,548.8	3,412.7	569.2	336.8	906.0	537.4	201.0	738.4	165.7	24.2	189.9	46.9	8.8	55.7
1994	1,907.7	1,687.8	3,595.4	627.8	327.2	955.0	542.0	214.2	756.2	174.3	46.2	220.5	41.7	31.2	72.9
1995	1,977.8	1,806.5	3,784.3	689.1	329.0	1,018.1	544.3	215.7	760.0	178.8	73.8	252.6	43.8	63.7	107.4
1996	2,024.6	1,983.4	4,008.0	723.1	335.9	1,058.9	575.3	193.1	768.4	168.8	117.4	286.3	46.5	91.0	137.5
1997	2,116.0	2,157.4	4,273.4	795.2	384.1	1,179.3	580.2	180.6	760.9	161.3	155.0	316.3	48.5	115.8	164.3
1998	2,223.8	2,457.3	4,681.1	849.5	470.2	1,319.7	590.4	207.3	797.7	157.7	257.5	415.2	57.1	198.3	255.3
1999	2,359.4	2,789.5	5,148.8	944.7	454.5	1,399.2	607.9	221.7	829.6	151.5	371.3	522.8	56.7	265.9	322.6
2000	2,560.9	3,040.8	5,601.7	1,043.0	470.5	1,513.5	655.9	213.4	869.3	155.4	452.0	607.4	59.2	325.9	385.1

Sources: Federal Reserve Board, FDIC, Fannie Mae, and Freddie Mac.

Note: 1. Data provided by the Mortgage Debt Holding Group at the Federal Reserve Board, which may differ from data provided by the Flow of Funds Group (Flow of Funds Group data are used in Tables 1 and 2.)

2. "Total Holdings" for Fannie Mae and Freddie Mac reflect net portfolio balances (net of unamortized discount/premium and price adjustments and allowance for losses).

Table 6

Net Total Residential Mortgage Debt Outstanding by Holders of Interest Rate Risk *Billions of Dollars*

Year	Total Mortgage Debt Outstanding				Commercial Banks				Thrifts				Fannie Mae				Freddie Mac			
	Mortgage Related		Total	Total	Mortgage Related		Total	Total	Mortgage Related		Total	Total	Mortgage Related		Total	Total	Mortgage Related		Total	Total
	Whole	Loans			Whole	Loans			Whole	Loans			Whole	Loans			Whole	Loans		
1991	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
1992	-13.8	170.9	157.1	56.7	-58.8	4.2	-54.6	25.3	4.2	25.3	4.2	29.5	6.9	0.1	7.0	6.9	0.1	7.0	7.0	7.0
1993	51.5	107.9	159.4	84.7	-22.0	11.7	-10.4	28.3	11.7	-10.4	5.6	33.9	13.2	9.0	22.2	13.2	9.0	22.2	22.2	22.2
1994	43.7	139.0	182.7	49.0	4.6	13.2	17.8	8.6	13.2	17.8	22.0	30.6	-5.2	22.3	17.1	-5.2	22.3	17.1	17.1	17.1
1995	70.1	118.8	188.9	63.1	2.4	1.5	3.9	4.5	1.5	3.9	27.6	32.1	2.0	32.5	34.5	2.0	32.5	34.5	34.5	34.5
1996	46.8	176.8	223.7	40.8	30.9	-22.6	8.3	-10.0	-22.6	8.3	43.7	33.7	2.8	27.4	30.1	2.8	27.4	30.1	30.1	30.1
1997	91.4	174.0	265.4	120.4	4.9	-12.4	-7.5	-7.5	-12.4	-7.5	37.6	30.1	2.0	24.8	26.7	2.0	24.8	26.7	26.7	26.7
1998	107.8	299.9	407.7	140.4	10.2	26.6	36.8	-3.6	26.6	36.8	102.5	98.9	8.6	82.5	91.1	8.6	82.5	91.1	91.1	91.1
1999	135.6	332.1	467.7	79.5	17.5	14.5	31.9	-6.2	14.5	31.9	113.7	107.6	-0.4	67.6	67.2	-0.4	67.6	67.2	67.2	67.2
2000	201.5	251.4	452.9	114.3	48.0	-8.3	39.7	3.9	-8.3	39.7	80.8	84.6	2.6	60.0	62.5	2.6	60.0	62.5	62.5	62.5

Sources: Federal Reserve Board, FDIC, Fannie Mae, and Freddie Mac.

Notes: 1. Net Debt Outstanding is defined as the change in mortgage debt outstanding between contiguous years.

2. Data provided by the Mortgage Debt Holding Group at the Federal Reserve Board, which may differ from data provided by the Flow of Funds Group. (Flow of Funds Group data are used in Tables 1 and 2.)

3. "Total Holdings" for Fannie Mae and Freddie Mac reflect net portfolio balances (net of unamortized discount/premium and price adjustments and allowance for losses)

4. N/A = Data and current estimate are unavailable.

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Table 7
Originations of Residential Mortgage Loans by Property Type
Billions of Dollars

Year	Total Originations	1-4 Family				Multifamily			
		Total 1-4 Family	FHA	VA	Conventional	Refi Share	ARM Share	Multifamily	Total FHA Conventional
1984	231.3	203.7	16.6	12.0	175.1	21.6%	61.3%	27.6	4.7 22.9
1985	321.7	289.8	28.8	15.2	245.8	19.6%	50.3%	31.9	3.5 28.5
1986	549.3	499.4	64.8	23.1	411.5	34.5%	30.9%	49.9	8.7 41.1
1987	552.3	507.2	77.8	30.2	399.2	33.4%	42.8%	45.1	6.8 38.3
1988	484.4	446.3	46.7	15.9	383.7	21.2%	58.3%	38.2	3.0 35.2
1989	484.1	452.9	45.1	13.7	394.1	24.0%	39.3%	31.1	1.0 30.2
1990	491.0	458.4	59.8	21.9	376.7	24.7%	28.1%	32.6	2.0 30.6
1991	587.6	562.1	46.9	15.3	499.9	30.7%	23.0%	25.5	0.9 24.6
1992	919.4	893.7	50.3	24.5	818.9	50.8%	20.3%	25.7	0.6 25.2
1993	1,051.6	1,019.9	83.5	41.0	895.4	52.4%	20.3%	31.7	1.7 30.0
1994	801.4	768.7	94.9	48.2	625.6	34.9%	38.9%	32.7	1.0 31.7
1995	678.6	639.4	48.4	26.3	564.8	21.2%	33.0%	39.2	1.3 37.9
1996	832.4	785.2	72.7	35.2	677.3	31.3%	26.6%	47.1	3.4 43.7
1997	907.1	859.1	74.2	28.0	756.9	29.0%	22.1%	47.9	3.4 44.6
1998	N/A	1,453.9	103.3	42.5	1,308.0	50.0%	12.1%	N/A	N/A N/A
1999	N/A	1,318.0	122.0	49.5	1,146.6	39.5%	22.2%	N/A	N/A N/A
2000	N/A	1,045.7	93.1	22.2	908.7	21.5%	24.6%	N/A	N/A N/A

Sources: Department of Housing and Urban Development and Fannie Mae Economics estimates.

- Notes:
1. Components may not add to total due to rounding.
 2. Data beginning in 1985 were revised to reflect a new survey methodology adopted in January 1990 -- not strictly comparable with earlier periods.
 3. HUD SMLA data are not available after 1997. Data for 1998, 1999 and 2000 are Fannie Mae Economics estimates.
 4. N/A = Data and current estimate are unavailable.

Table 8
Originations of Residential Mortgage Loans by Selected Lender Type¹

Billions of Dollars

<u>Year</u>	<u>Total</u>	<u>Commercial Banks</u>	<u>Mutual Savings Banks</u>	<u>Savings and Loan Associations</u>	<u>Mortgage Companies</u>	<u>Other</u>
1984	231.3	45.4	14.7	109.3	48.0	13.8
1985	321.7	61.5	8.3	124.9	112.8	14.2
1986	549.3	115.8	34.0	196.0	183.2	20.4
1987	552.3	132.8	39.0	192.4	169.5	18.6
1988	484.4	108.8	31.5	177.9	152.5	13.7
1989	484.1	130.9	25.3	145.9	170.9	11.1
1990	491.0	164.3	19.5	130.3	166.7	10.3
1991	587.6	165.5	19.5	128.2	265.9	8.4
1992	919.4	243.8	35.3	191.9	439.7	8.8
1993	1,051.6	287.8	40.5	185.5	528.5	9.2
1994	801.4	220.9	31.4	129.0	408.1	12.0
1995	678.6	178.5	25.1	99.5	364.8	10.8
1996	832.4	201.2	35.8	126.6	458.1	10.7
1997	907.1	232.0	24.2	135.7	505.3	9.8

Sources: Department of Housing and Urban Development, Office of Thrift Supervision, and Fannie Mae Economics estimates.
¹ Includes only 1-4 family and multifamily long-term originations.

- Notes:
1. Components may not add to total because of rounding.
 2. Mortgage activities of federal savings banks are included in the savings and loan category beginning in the second quarter of 1984.
 3. Substantial revisions were made to the origination data by HUD for 1985 and 1986, resulting in a higher volume of commercial bank originations and a lower volume of mutual savings bank originations.
 4. Data beginning in 1985 were revised by HUD to reflect a new survey methodology adopted in January 1990 -- not strictly comparable with earlier periods.
 5. HUD SMLA data are not available after 1997.
 6. Data are not available after 1997.

Table 9
Housing Production
Thousands of Units

<u>Year</u>	<u>Total</u>	<u>Private Housing Starts</u>				<u>Public Housing Starts</u>	<u>Mobile Home Shipments</u>
		<u>Total</u>	<u>Single-Family</u>	<u>Multifamily</u>	<u>2-4 Family</u>	<u>5+ Family</u>	
1984	2,051	1,749	1,084	665	121	544	296
1985	2,029	1,742	1,072	670	94	576	284
1986	2,049	1,805	1,180	626	84	542	242
1987	1,856	1,621	1,146	474	65	409	233
1988	1,706	1,488	1,081	407	59	348	218
1989	1,574	1,376	1,003	373	55	318	198
1990	1,381	1,193	895	298	38	260	188
1991	1,185	1,014	840	174	36	138	171
1992	1,410	1,200	1,030	170	31	139	210
1993	1,542	1,288	1,126	162	29	133	254
1994	1,761	1,457	1,198	259	35	224	304
1995	1,694	1,354	1,076	278	34	244	340
1996	1,840	1,477	1,161	316	45	271	363
1997	1,828	1,474	1,134	340	45	296	354
1998	1,990	1,617	1,271	345	43	303	373
1999	1,989	1,641	1,303	339	32	307	348
2000	1,819	1,569	1,231	338	39	299	251

Source: U.S. Department of Commerce, Bureau of the Census, "Housing Starts," Series C-20.

Notes:

1. Components may not add to total because of rounding.
2. The Census Bureau declined to publish an annual total for public housing starts after 1987 because the quality of monthly data had become increasingly unreliable.
3. Total equals public and private housing starts plus mobile home shipments.

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Table 10
New and Existing Single-Family Home Sales and Prices

<u>Year</u>	-----New Homes-----			-----Existing Homes-----		
	<u>Sales</u> (000s of units)	<u>Median</u> <u>Sales</u> <u>Price</u>	<u>Average</u> <u>Sales</u> <u>Price</u>	<u>Sales</u> (000s of units)	<u>Median</u> <u>Sales</u> <u>Price</u>	<u>Average</u> <u>Sales</u> <u>Price</u>
1984	639	\$79,900	\$97,600	2,828	\$72,400	\$86,000
1985	688	\$84,300	\$100,800	3,132	\$75,500	\$90,800
1986	752	\$92,000	\$111,900	3,475	\$80,300	\$98,500
1987	672	\$104,500	\$127,200	3,437	\$85,600	\$106,300
1988	675	\$112,500	\$138,300	3,512	\$89,300	\$112,800
1989	650	\$120,000	\$148,800	3,324	\$89,500	\$114,400
1990	535	\$122,900	\$149,800	3,220	\$92,000	\$115,300
1991	507	\$120,000	\$147,200	3,186	\$97,100	\$124,700
1992	610	\$121,500	\$144,100	3,479	\$99,700	\$126,600
1993	666	\$126,500	\$147,700	3,787	\$103,100	\$129,300
1994	670	\$130,000	\$154,500	3,917	\$107,200	\$133,500
1995	665	\$133,900	\$158,700	3,886	\$110,500	\$135,800
1996	758	\$140,000	\$166,400	4,197	\$115,800	\$141,800
1997	805	\$146,000	\$176,200	4,382	\$121,800	\$150,500
1998	885	\$152,500	\$181,900	4,970	\$128,400	\$159,100
1999	881	\$161,000	\$195,600	5,205	\$133,300	\$168,300
2000	877	\$169,000	\$207,000	5,114	\$139,000	\$176,200

Sources: U.S. Department of Commerce, Bureau of the Census, "New One-Family Houses Sold and For Sale", Series C-25, and National Association of Realtors.

Table 11
Homeownership Rate by Race and Ethnicity of Householders

<u>Year</u>	<u>National</u>	<u>Non-Hispanic</u>			<u>Hispanic</u>	<u>All Minorities</u>
		<u>White</u>	<u>Black</u>	<u>Other</u>		
1984	64.5	69.0	46.0	50.9	40.1	44.8
1985	64.3	69.0	44.4	50.7	41.1	44.1
1986	63.8	68.4	44.8	49.7	40.6	44.1
1987	64.0	68.7	45.8	48.7	40.6	44.5
1988	64.0	69.1	42.9	49.7	40.6	43.1
1989	64.0	69.3	42.1	50.6	41.6	43.0
1990	64.1	69.4	42.6	49.2	41.2	43.1
1991	64.0	69.5	42.7	51.3	39.0	42.6
1992	64.1	69.6	42.6	52.5	39.9	43.1
1993	64.1	70.2	42.0	50.6	39.4	42.4
1994	64.2	70.1	42.8	51.7	41.6	43.6
1995	64.7	70.8	42.2	51.0	42.4	43.4
1996	65.4	71.6	44.3	50.5	41.2	44.2
1997	65.7	71.7	46.0	52.8	43.1	46.1
1998	66.2	72.2	46.6	53.5	44.9	47.1
1999	66.7	73.0	46.1	53.7	45.2	47.0
2000	67.2	73.6	47.6	53.9	45.5	47.8

Source: U.S. Department of Commerce, Bureau of the Census.

- Note: 1. Beginning in the first quarter of 1994, a new weighting procedure was implemented based on the 1990 decennial census. Annual numbers beginning in 1993 reflect the new procedure, and therefore caution should be used with comparisons prior to 1993.
2. The homeownership data reported reflects data obtained by the Bureau of the Census from the Current Population Survey and not Census 2000.

Table 12

OFHEO House Price Index

4th Quarter over 4th Quarter Percentage Change

<u>Year</u>	<u>National</u>	<u>New England</u>	<u>Mid Atlantic</u>	<u>East North Central</u>	<u>West North Central</u>	<u>South Atlantic</u>	<u>East South Central</u>	<u>West South Central</u>	<u>Mountain</u>	<u>Pacific</u>
1984	5.5%	17.4%	13.5%	2.7%	4.9%	4.2%	4.4%	0.0%	2.0%	5.2%
1985	6.7%	24.9%	14.3%	4.9%	4.3%	5.6%	4.5%	-1.2%	2.4%	4.9%
1986	8.2%	20.9%	17.9%	7.3%	4.3%	6.0%	5.8%	-0.6%	3.1%	7.3%
1987	6.8%	13.2%	16.0%	8.1%	2.4%	6.8%	4.0%	-8.7%	-2.9%	9.5%
1988	6.2%	3.8%	6.1%	6.7%	2.5%	6.8%	2.6%	-2.2%	0.3%	17.4%
1989	6.1%	0.7%	2.4%	6.0%	3.2%	5.0%	3.1%	2.9%	2.8%	19.5%
1990	0.2%	-7.6%	-2.8%	3.7%	0.5%	0.2%	0.7%	0.4%	1.8%	2.8%
1991	2.6%	-2.2%	1.5%	4.6%	3.8%	3.1%	4.1%	3.7%	4.8%	1.4%
1992	1.9%	-1.0%	1.7%	3.9%	3.0%	2.1%	3.3%	3.4%	5.3%	-1.4%
1993	2.1%	0.5%	1.4%	3.5%	3.8%	2.0%	4.0%	4.0%	7.9%	-1.9%
1994	0.9%	-2.8%	-3.2%	5.2%	5.6%	0.1%	4.9%	1.6%	9.4%	-3.4%
1995	4.5%	4.2%	3.2%	6.0%	5.3%	4.4%	5.5%	4.1%	7.4%	2.9%
1996	2.6%	1.8%	0.2%	5.1%	4.1%	2.2%	4.0%	2.2%	4.5%	1.0%
1997	4.8%	4.9%	3.5%	5.3%	5.1%	4.8%	5.1%	4.0%	5.1%	5.5%
1998	5.4%	6.9%	4.6%	4.3%	4.9%	4.8%	5.1%	5.4%	4.6%	8.0%
1999	6.3%	9.9%	6.2%	6.6%	8.4%	5.2%	3.9%	5.6%	5.4%	6.5%
2000	8.9%	14.0%	9.1%	6.9%	8.3%	8.1%	5.1%	6.8%	8.8%	12.6%

Source: Department of Housing and Urban Development, Office of Federal Housing Enterprise Oversight (OFHEO).

Table 13
Selected Interest Rates
Percent

<u>Year</u>	<u>Treasury Constant Maturity</u>					<u>11th District Cost of Funds</u>	<u>Mortgage Rates</u>	
	<u>6-Month</u>	<u>1-Year</u>	<u>3-Year</u>	<u>5-Year</u>	<u>7-Year</u>	<u>10-Year</u>	<u>Fixed</u> ¹	<u>Adjustable</u> ²
1984	10.40	10.89	11.89	12.24	12.40	12.44	13.87	11.51
1985	8.07	8.43	9.64	10.13	10.51	10.62	12.42	10.05
1986	6.31	6.46	7.06	7.31	7.55	7.68	10.18	8.43
1987	6.33	6.76	7.67	7.93	8.22	8.38	10.20	7.83
1988	7.27	7.65	8.26	8.47	8.71	8.85	10.34	7.90
1989	8.49	8.54	8.56	8.50	8.52	8.50	10.32	8.80
1990	7.85	7.88	8.25	8.37	8.52	8.55	10.13	8.36
1991	5.69	5.86	6.81	7.37	7.68	7.86	9.25	7.09
1992	3.66	3.89	5.31	6.19	6.63	7.01	8.40	5.63
1993	3.22	3.43	4.44	5.15	5.55	5.87	7.33	4.59
1994	4.82	5.31	6.26	6.68	6.90	7.08	8.36	5.36
1995	5.82	5.95	6.26	6.39	6.50	6.58	7.96	6.06
1996	5.29	5.51	5.99	6.18	6.34	6.44	7.81	5.67
1997	5.39	5.63	6.10	6.22	6.32	6.35	7.60	5.61
1998	5.02	5.05	5.14	5.15	5.28	5.26	6.94	5.58
1999	4.94	5.08	5.49	5.54	5.78	5.64	7.43	5.98
2000	6.17	6.11	6.22	6.15	6.20	6.03	8.06	7.04

Sources: Federal Reserve Board, Freddie Mac, and Federal Home Loan Bank of San Francisco.

¹ Thirty-year conventional contract loan rate with 20 percent down payment.

² One-year Treasury-indexed conventional contract loan rate with 20 percent down payment.

Note: Figures are annual averages of monthly data.

Table 14
Loan Limits

<u>Year</u>	<u>---Fannie Mae/Freddie Mac--- Conforming¹</u>	<u>AK & HI</u>	<u>-----FHA-----</u>		<u>VA Limit</u>
			<u>Non-High Cost</u>	<u>High Cost</u>	
1984	\$114,000	\$171,000	\$67,500	\$90,000	\$27,500
1985	\$115,300	\$172,950	\$67,500	\$90,000	\$27,500
1986	\$133,250	\$199,875	\$67,500	\$90,000	\$27,500
1987	\$153,100	\$229,650	\$67,500	\$90,000	\$36,000
1988	\$168,700	\$253,050	\$67,500	\$101,250	\$36,000
1989	\$187,600	\$281,400	\$67,500	\$101,250	\$46,000
1990	\$187,450	\$281,175	\$67,500	\$124,875	\$46,000
1991	\$191,250	\$286,875	\$67,500	\$124,875	\$46,000
1992	\$202,300	\$303,450	\$67,500	\$151,725	\$46,000
1993	\$203,150	\$304,725	\$67,500	\$151,725	\$46,000
1994	\$203,150	\$304,725	\$77,197	\$152,362	\$50,750
1995	\$203,150	\$304,725	\$77,197	\$152,363	\$50,750
1996	\$207,000	\$310,500	\$78,660	\$155,250	\$50,750
1997	\$214,600	\$321,900	\$81,548	\$160,950	\$50,750
1998	\$227,150	\$340,725	\$109,032	\$197,621	\$50,750
1999	\$240,000	\$360,000	\$115,200	\$208,800	\$50,750
2000	\$252,700	\$379,050	\$121,296	\$219,849	\$50,750
2001	\$275,000	\$412,500	\$132,000	\$239,250	\$50,750

Sources: Fannie Mae and Department of Housing and Urban Development.

¹ The dollar limit on single-family loans that can be purchased or securitized by Fannie Mae and Freddie Mac.

Notes: 1. The Fannie Mae/Freddie Mac conforming loan limits are increased by 50 percent for loans made in Alaska and Hawaii.

2. The FHA limits for non-high cost metropolitan areas and high cost metropolitan areas are based upon a percentage of the Fannie Mae/Freddie Mac conforming loan limits. The percentages were last changed in 1998, increasing to 48 percent and 87 percent, respectively.

3. Lenders self impose loan limits up to four times the VA limit based on the secondary market. The VA guarantees loans up to the VA limit.

Table 15
Secondary Market Activity of 1-4 Family Mortgage Loans
Billions of Dollars

Total Secondary Market	Portfolio			Total	Agency MBS			Seasoned			Private- MBS		Total	Orig	
	Fannie		Freddie		Current		Ginnie	Fannie		Freddie	Mac	Mac			
	Total	Mae	Mae		Total	Mae	Mae	Total	Mae	Mae					
1984	84.4	17.6	14.6	3.0	59.1	39.3	5.1	7.0	27.2	19.8	8.3	11.5	7.7	203.7	
1985	137.4	23.6	19.4	4.2	105.9	78.6	13.4	20.2	45.0	27.3	9.7	17.6	7.9	289.8	
1986	292.6	20.2	17.2	3.0	256.3	211.8	39.3	73.0	99.5	44.5	20.7	23.8	16.2	499.4	
1987	262.6	13.9	12.1	1.8	227.6	206.4	53.3	60.4	92.7	21.2	8.8	12.4	21.2	507.2	
1988	183.8	16.8	13.5	3.4	143.5	129.0	44.0	32.1	52.9	14.5	7.1	7.4	23.4	446.3	
1989	229.6	18.1	13.6	4.5	195.0	171.9	59.3	57.0	55.6	23.2	7.2	16.0	16.4	452.9	
1990	268.4	17.2	15.0	2.2	231.1	195.9	79.0	53.8	63.1	35.2	17.0	18.2	20.1	458.4	
1991	344.4	29.5	22.2	7.3	265.6	228.6	93.4	73.6	61.6	37.0	18.1	18.9	49.3	562.1	
1992	610.3	67.5	55.6	11.9	453.4	430.3	182.9	166.4	81.0	23.1	10.3	12.8	89.5	893.7	
1993	753.5	89.9	69.5	20.3	565.2	549.0	214.3	198.7	136.0	16.2	6.2	10.0	98.5	1,019.9	
1994	455.2	37.5	31.8	5.7	354.5	341.6	120.8	111.6	109.2	12.9	7.6	5.3	63.2	768.7	
1995	322.6	25.8	21.3	4.4	262.1	235.9	90.8	74.4	70.7	26.2	15.1	11.1	34.8	639.4	
1996	425.2	25.9	22.0	3.9	360.9	335.8	126.9	110.3	98.6	25.1	16.5	8.6	38.5	785.2	
1997	440.0	19.9	18.5	1.4	356.8	332.7	125.1	106.0	101.7	24.0	16.2	7.8	63.3	859.1	
1998	901.9	55.9	42.0	13.9	711.5	675.1	288.8	239.2	147.1	36.5	26.0	10.5	134.5	1,453.9	
1999	792.9	28.5	26.9	1.6	671.5	634.8	270.3	215.9	148.6	36.6	21.6	15.1	92.9	1,318.0	
2000	565.5	27.0	24.1	2.9	468.3	417.7	178.8	138.5	100.4	50.5	24.0	26.6	70.3	1,046.0	

Sources: Department of Housing and Urban Development, GNMA, Fannie Mae, Freddie Mac/Inside MBS & ABS, and Fannie Mae Economics estimates

- Notes: 1. Sales to MBS from Fannie Mae/Freddie Mac portfolios, as well as purchases of MBS for the portfolios, are netted out to avoid double counting. T activity is included in the MBS category
2. Fannie Mae sold about \$10 billion out of portfolio to MBS in 1986 for portfolio restructuring purposes. This amount is included in the Fannie Mae season MBS issues for the year
3. HUD SMLA data are not available after 1997. Data for 1998, 1999, and 2000 are Fannie Mae Economics estimates

Table 16
Secondary Market Activity of 1-4 Family Mortgage Loans
Percent of 1-4 Family Originations

Total Secondary Market	Portfolio			Total			Agency MBS						Private- --MBS--	---Orig- (billions)		
							Current									
	Total	Fannie	Freddie	Total	Fannie	Freddie	Ginnie	Total	Fannie	Freddie	Mac					
		Mae	Mac													
1984	41.4%	8.7%	7.2%	1.5%	29.0%	19.3%	2.5%	3.4%	13.4%				9.7%	4.1%	5.6%	203.7
1985	47.4%	8.1%	6.7%	1.4%	36.6%	27.1%	4.6%	7.0%	15.5%				9.4%	3.3%	6.1%	289.8
1986	58.6%	4.0%	3.4%	0.6%	51.3%	42.4%	7.9%	14.6%	19.9%				8.9%	4.1%	4.8%	499.4
1987	51.8%	2.7%	2.4%	0.3%	44.9%	40.7%	10.5%	11.9%	18.3%				4.2%	1.7%	2.4%	507.2
1988	41.2%	3.8%	3.0%	0.8%	32.2%	28.9%	9.9%	7.2%	11.9%				3.3%	1.6%	1.7%	446.3
1989	50.7%	4.0%	3.0%	1.0%	43.1%	37.9%	13.1%	12.6%	12.3%				5.1%	1.6%	3.5%	452.9
1990	58.6%	3.7%	3.3%	0.5%	50.4%	42.7%	17.2%	11.7%	13.8%				7.7%	3.7%	4.0%	458.4
1991	61.3%	5.2%	4.0%	1.3%	47.3%	40.7%	16.6%	13.1%	11.0%				6.6%	3.2%	3.4%	562.1
1992	68.3%	7.5%	6.2%	1.3%	50.7%	48.2%	20.5%	18.6%	9.1%				2.6%	1.2%	1.4%	893.7
1993	73.9%	8.8%	6.8%	2.0%	55.4%	53.8%	21.0%	19.5%	13.3%				1.6%	0.6%	1.0%	1,019.9
1994	59.2%	4.9%	4.1%	0.7%	46.1%	44.4%	15.7%	14.5%	14.2%				1.7%	1.0%	0.7%	768.7
1995	50.5%	4.0%	3.3%	0.7%	41.0%	36.9%	14.2%	11.6%	11.1%				4.1%	2.4%	1.7%	639.4
1996	54.2%	3.3%	2.8%	0.5%	46.0%	42.8%	16.2%	14.0%	12.6%				3.2%	2.1%	1.1%	785.2
1997	51.2%	2.3%	2.2%	0.2%	41.5%	38.7%	14.6%	12.3%	11.8%				2.8%	1.9%	0.9%	859.1
1998	62.0%	3.8%	2.9%	1.0%	48.9%	46.4%	19.9%	16.4%	10.1%				2.5%	1.8%	0.7%	1,453.9
1999	60.2%	2.2%	2.0%	0.1%	50.9%	48.2%	20.5%	16.4%	11.3%				2.8%	1.6%	1.1%	1,318.0
2000	54.1%	2.6%	2.3%	0.3%	44.8%	39.9%	17.1%	13.2%	9.6%				4.8%	2.3%	2.5%	1,046.0

Sources: Department of Housing and Urban Development, GNMA, Fannie Mae, Freddie Mac *Inside MBS & ABS*, and Fannie Mae Economics estimates

- Notes: 1. Sales to MBS from Fannie Mae/Freddie Mac portfolios, as well as purchases of MBS for the portfolios, are netted out to avoid double counting. T1 activity is included in the MBS category
2. Fannie Mae sold about \$10 billion out of portfolio to MBS in 1986 for portfolio restructuring purposes. This amount is included in the Fannie Mae season MBS issues for the year
3. HUD SMLA data are not available after 1997. Data for 1998, 1999, and 2000 are Fannie Mae Economics estimates

Table 17
Secondary Market Purchases of Multifamily Mortgage Loans
Billions of Dollars

Total Secondary Market	----- Portfolio -----			----- Agency MBS -----			-Private- --MBS--	----Originations----	
	Total	Fannie Mae	Freddie Mac	Total	Fannie Mae	Freddie Mac		Total	Conv'l
1984	2.3	0.8	0.6	0.2	1.5	0.5	0.9	27.6	22.9
1985	4.5	1.6	0.6	1.0	2.9	0.5	0.9	31.9	28.5
1986	8.5	2.3	1.3	1.0	6.2	0.5	1.9	49.9	41.1
1987	5.7	0.2	0.3	-0.1	5.5	1.2	2.2	45.1	38.3
1988	7.6	1.3	0.4	0.9	6.3	3.8	2.3	38.2	35.2
1989	8.1	2.8	1.6	1.2	5.3	3.3	1.5	31.1	30.2
1990	5.8	2.0	2.5	-0.5	3.8	0.7	1.2	32.6	30.6
1991	4.4	2.0	1.8	0.2	2.4	1.4	1.0	25.5	24.6
1992	3.9	2.1	2.1	0.0	1.8	0.9	0.9	25.7	25.2
1993	8.6	3.4	3.2	0.2	3.0	1.0	2.0	31.7	30.0
1994	10.3	2.2	1.6	0.6	4.4	2.2	1.9	32.7	31.7
1995	9.9	2.2	1.0	1.2	6.6	4.2	2.1	39.2	37.9
1996	12.5	2.7	1.3	1.5	8.8	5.7	2.4	47.1	43.7
1997	18.9	2.7	1.0	1.7	8.7	5.8	2.4	47.9	44.6
1998	36.2	5.6	2.6	3.0	13.6	10.6	2.1	N/A	N/A
1999	37.3	8.7	3.6	5.1	13.6	8.5	3.0	N/A	N/A
2000	29.0	8.8	4.6	4.2	13.4	7.6	4.0	N/A	N/A

Sources: Department of Housing and Urban Development, GNMA, Fannie Mae, Freddie Mac, *Inside MBS & ABS*, and Fannie Mae Economics estimate.

Notes: 1. Sales to MBS from Fannie Mac/Freddie Mac portfolios, as well as purchases of MBS for the portfolios, are netted out to avoid double accounting. The activity is included in the MBS category.

2. HUD SMLA data are not available after 1997. Data for 1998, 1999, and 2000 are Fannie Mae Economics estimates.

3. N/A = Data and current estimate are unavailable.

Table 18
Secondary Market Purchases of Multifamily Mortgage Loans
Percentage of Multifamily Originations

Total Secondary Market	----- Portfolio -----			----- Agency MBS -----			-Private- --MBS--	-----Originations----- (billions of dollars)	
	Total	Fannie Mae	Freddie Mac	Total	Fannie Mae	Freddie Mac		Total	Conv'l
1984	8.5%	2.9%	2.2%	0.7%	1.7%	0.7%	0.0%	27.6	22.9
1985	14.0%	5.0%	1.9%	3.1%	1.6%	4.4%	0.0%	31.9	28.5
1986	17.0%	4.6%	2.6%	2.0%	1.1%	7.4%	0.0%	49.9	41.1
1987	12.7%	0.4%	0.7%	-0.2%	2.6%	4.8%	0.0%	45.1	38.3
1988	19.9%	3.4%	1.0%	2.4%	9.8%	0.8%	0.0%	38.2	35.2
1989	26.0%	8.9%	5.0%	3.9%	10.5%	1.9%	0.0%	31.1	30.2
1990	17.7%	6.2%	7.7%	-1.5%	2.1%	5.6%	0.0%	32.6	30.6
1991	17.3%	7.9%	7.0%	0.9%	5.5%	0.0%	0.0%	25.5	24.6
1992	15.1%	8.3%	8.2%	0.1%	3.3%	0.0%	0.0%	25.7	25.2
1993	27.1%	10.6%	10.0%	0.6%	3.0%	0.0%	7.1%	31.7	30.0
1994	31.7%	6.9%	4.9%	2.0%	6.8%	0.6%	11.4%	32.7	31.7
1995	25.3%	5.7%	2.6%	3.1%	10.7%	0.9%	2.7%	39.2	37.9
1996	26.6%	5.8%	2.7%	3.1%	12.0%	1.6%	2.1%	47.1	43.7
1997	39.4%	5.7%	2.1%	3.6%	12.1%	1.0%	15.6%	47.9	44.6
1998	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
1999	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2000	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Sources: Department of Housing and Urban Development, GNMA, Fannie Mae, Freddie Mac, *Inside MBS & ABS*, and Fannie Mae Economics estimate.

- Notes: 1. Sales to MBS from Fannie Mae/Freddie Mac portfolios, as well as purchases of MBS for the portfolios, are netted out to avoid double accounting. The activity is included in the MBS category.
2. HUD SMLA data are not available after 1997.
3. N/A = Data and current estimate are unavailable.

Table 19
Private Mortgage Insurance Activity
Millions of Dollars

<u>Year</u>	<u>Primary New Insurance Written</u>	<u>% Change</u>	<u>Primary Insurance In Force</u>	<u>% Change</u>
1984	65.5	42.8%	192.0	29.8%
1985	51.2	-21.9%	223.7	16.5%
1986	47.7	-6.8%	230.3	2.9%
1987	45.2	-5.2%	224.2	-2.6%
1988	40.9	-9.5%	220.4	-1.7%
1989	39.1	-4.4%	228.6	3.7%
1990	40.9	4.6%	232.9	1.9%
1991	57.7	41.0%	255.9	9.9%
1992	101.5	76.1%	284.6	11.2%
1993	136.9	34.9%	337.8	18.7%
1994	133.1	-2.8%	406.3	20.3%
1995	109.9	-17.5%	460.8	13.4%
1996	127.6	16.1%	513.2	11.4%
1997	122.2	-4.2%	546.1	6.4%
1998	189.7	55.2%	559.4	2.4%
1999	190.5	0.4%	598.5	7.0%
2000	163.8	-14.0%	650.1	8.6%

Source: *The Mortgage Market Statistical Annual For 2000 - Volume I*, Inside Mortgage Finance Publishers, Inc.

B

After Recording Return To:

_____[Space Above This Line For Recording Data]_____

MORTGAGE

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated _____, together with all Riders to this document.

(B) "Borrower" is _____. Borrower's address is _____.

_____. Borrower is the mortgagor under this Security Instrument.

(C) "Lender" is _____. Lender is a _____ organized and existing under the laws of _____. Lender's address is _____.

_____. Lender is the mortgagee under this Security Instrument.

(D) "Note" means the promissory note signed by Borrower and dated _____. The Note states that Borrower owes Lender _____

Dollars (U.S. \$_____) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____.

(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- | | | |
|--|---|---|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> Other(s) [specify] _____ |
| <input type="checkbox"/> 1-4 Family Rider | <input type="checkbox"/> Biweekly Payment Rider | |

(H) **"Applicable Law"** means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(I) **"Community Association Dues, Fees, and Assessments"** means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(J) **"Electronic Funds Transfer"** means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(K) **"Escrow Items"** means those items that are described in Section 3.

(L) **"Miscellaneous Proceeds"** means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(M) **"Mortgage Insurance"** means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(N) **"Periodic Payment"** means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) **"RESPA"** means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(P) **"Successor in Interest of Borrower"** means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, warrant, grant and convey to Lender and Lender's successors and assigns, with power of sale, the following described property located in the _____

[Type of Recording Jurisdiction]

of _____;

[Name of Recording Jurisdiction]

which currently has the address of _____

[Street]

_____, Michigan _____ ("Property Address");

[City]

[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. **Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and

Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained

might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. **Assignment of Miscellaneous Proceeds; Forfeiture.** All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for

Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. **Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall give notice of sale to Borrower in the manner provided in Section 15. Lender shall publish and post the notice of sale, and the Property shall be sold in the manner prescribed by Applicable Law. Lender or its designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. **Release.** Upon payment of all sums secured by this Security Instrument, Lender shall prepare and file a discharge of this Security Instrument. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

NOTE

[Date]

[City]

[State]

[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$_____ (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is _____.

I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of _____%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the _____ day of each month beginning on _____, _____. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on _____, 20____, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at _____

or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$_____.

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of _____ calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be _____ % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED

_____(Seal)
- Borrower

_____(Seal)
- Borrower

_____(Seal)
- Borrower

[Sign Original Only]



C

2002 U.S. Dist. LEXIS 1245 printed in FULL format.

TIM A. MICHALOWSKI and, MERI C. MICHALOWSKI, Plaintiff, v. FLAGSTAR BANK, FSB; and
CMC FINANCIAL, LLC, Defendants.

No. 01 C 6095

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN
DIVISION

2002 U.S. Dist. LEXIS 1245

January 24, 2002, Decided

January 25, 2002, Docketed

DISPOSITION: [*1] Defendants' motions to dismiss granted in part and denied in part. Counts V, VI, VII, VIII, IX, and X dismissed with prejudice.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, purchasers of a home, filed a putative class action against defendants, a bank and a financial company, alleging violation of *12 U.S.C.S. § 2607(a)*, violation of 815 Ill. Comp. Stat. 505/2, breach of fiduciary duty inducing breach of fiduciary duty, fraud, restitution, violation of *15 U.S.C.S. § 1638*, a common law claim for unauthorized practice law, and consumer fraud. Defendants moved to dismiss.

OVERVIEW: The purchasers' mortgage loan was arranged by the financial company, and sold to the bank before closing. At closing the previously quoted interest rate was higher. The bank charged a number of fees, including a yield spread premium based on the increase in the interest rate. The court found that a factual dispute existed with respect to whether the yield spread premium was paid merely for the referral of business and was not compensation for services performed by the financial company. The purchasers sufficiently pleaded their yield spread premium claim based on the facts in the complaint. All of the state law claims alleged fraudulent or tortious conduct by the bank. The purchasers did not maintain that the actual fees the bank charged were unlawful; rather, they challenged the methods through which the bank collected the fees, arguing that the bank knowingly overcharged and deceived them. The alleged fraudulent activity alleged was not the amount of the yield spread premium, but rather the bank's alleged deceptive act of paying the financial company solely for arranging a higher interest rate on the loan.

OUTCOME: Defendants' motions to dismiss were granted in part and denied in part. The claims that were dismissed were dismissed with prejudice.

CORE TERMS: spread, premium, preparation, mort-

gage, interest rate, lender, unauthorized practice of law, mortgage loan, referral, service fee, estimate, broker, settlement, policy statement, restitution, plead, motion to dismiss, disclosure, charging, borrower, breach of fiduciary duty, breach of contract, premium payment, marked, state law, mortgage broker, third party, fiduciary duty, lending, Federal Rule of Civil Procedure

CORE CONCEPTS -

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

In considering the merits of a motion made pursuant to Fed. R. Civ. P. 12(b)(6), the well-plead allegations of a complaint must be accepted as true.

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

Fed. R. Civ. P. 12(b)(6) allows a district court to dismiss a complaint that fails to state a claim upon which relief may be granted. In considering the merits of a motion made pursuant to Fed. R. Civ. P. 12(b)(6), the well-plead allegations of a complaint must be accepted as true. In addition, all ambiguities will be construed in favor of a plaintiff. A court generally should only dismiss a complaint where it is clear that no relief can be granted with the allegations. Additional facts submitted outside of the pleadings will be explicitly excluded and not considered, except those documents that are attached to a motion to dismiss, are referred to in the complaint and are central to a plaintiff's claims.

Banking Law: Bank Activities: Consumer Protection: Real Estate Settlement Procedures

The Real Estate Settlement Procedures Act, *12 U.S.C.S. § 2601* et seq., protects home buyers from unnecessarily high settlement charges caused by certain abusive practices. *12 U.S.C.S. § 2601(a)*.

Banking Law: Bank Activities: Consumer Protection:

Real Estate Settlement Procedures
See 12 U.S.C.S. § 2607(a).

Banking Law: Bank Activities: Consumer Protection:
Real Estate Settlement Procedures

Even if it is established that a referral fee has been paid, there is no violation of violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C.S. § 2601 et seq., if the payment is compensation for goods or facilities actually furnished or for services actually performed so long as a disclosure is made of the existence of such an arrangement to the person being referred. 12 U.S.C.S. § 2607 (c)(2). In other words, it is perfectly legal under RESPA for a lender to pay a mortgage broker for services the broker has performed in connection with a real estate transaction but it is illegal for a lender to pay a broker a referral fee for sending business the lender's way.

Banking Law: Bank Activities: Consumer Protection:
Real Estate Settlement Procedures

Yield spread premium payments are not per se illegal, but that certain unscrupulous lenders use the yield spread premium payment improperly as a means to compensate brokers for originating loans with higher interest rates.

Banking Law: Bank Activities: Consumer Protection:
Real Estate Settlement Procedures

A two-part test is used to determine whether a yield spread premium is an illegal referral fee or a permissible fee for service rendered. Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (1999). This two-part test was confirmed by the Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under § 8(b), 66 Fed. Reg. 53052 (2001). Under the two-step framework for analyzing the legality of lender payments to brokers, a district court is required to first consider whether goods or facilities are actually furnished or services are actually performed for the compensation paid and second, whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed. 64 Fed. Reg. at 10084 (1999); 66 Fed. Reg. at 53054 (2001).

Banking Law: Bank Activities: Consumer Protection:
Real Estate Settlement Procedures

A yield spread premium payment is to be factored in as one element of a broker's total compensation when evaluating the overall reasonableness of the compensa-

tion and the framework for evaluating the reasonableness of the total compensation for a particular transaction is considered in relation to price structures and practices in similar transactions and in similar markets. Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (1999); Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under § 8(b), 66 Fed. Reg. 53052 (2001).

Banking Law: Regulatory Agencies: Office of Thrift Supervision

The Office of Thrift Supervision occupies the entire field of lending regulation for federal savings associations. 12 C.F.R. § 560.2(a).

Antitrust & Trade Law: Consumer Protection:
Deceptive Sales Practices

Civil Procedure: Pleading & Practice: Pleadings:
Heightened Pleading Requirements

To show a violation of the Illinois Consumer Fraud Act, 815 Ill. Comp. Stat. 505/1, a plaintiff must allege (1) a deceptive act or practice by defendants, (2) defendants' intent that plaintiff rely on the deception, and (3) that the deception occurred in the course of conduct involving trade or commerce. Fed. R. Civ. P. 9(b) provides that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Fed. R. Civ. P. 9(b). The heightened pleading standard imposed by Fed. R. Civ. P. 9(b) applies to claims arising under 815 Ill. Comp. Stat. 505/1. A plaintiff must identify a person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated. In other words, a plaintiff must plead the who, what, when, and where of the alleged fraud.

Civil Procedure: Pleading & Practice: Pleadings:
Heightened Pleading Requirements

Fed. R. Civ. P. 9(b) ensures that a party accused of fraud, a matter implying some degree of moral turpitude and often involving a wide variety of potential conduct, is given adequate notice of the specific activity that a plaintiff claims constituted the fraud so that the accused party may file an effective responsive pleading.

Antitrust & Trade Law: Consumer Protection:
Deceptive Sales Practices

Not every breach of contract constitutes a cause of action under the Illinois Consumer Fraud Act, 815 Ill. Comp.

Stat. 505/1. Courts consistently resist attempts by litigants to portray otherwise ordinary breach of contract claims as causes of action under the act.

Contracts Law: Types of Contracts: Implied-in-Law Contracts

Contracts Law: Remedies: Restitution

The remedy of restitution for unjust enrichment is not available in cases where a claim is governed by a contract. The doctrine of unjust enrichment presents an implied or quasi-contract claim, where there is a specific contract which governs the relationship between the parties.

Business & Corporate Entities: Agency: Agency Established: Elements of Agency

Business & Corporate Entities: Agency: Agents Distinguished: Fiduciary Relationships

A fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith, in fact to treat a principal as well as the agent would treat himself. Although a fiduciary relationship may be found when one person solicits another to repose trust in his expertise, the fact that one party trusts the other is insufficient to create a fiduciary relationship. An agency relationship has two components: (1) a principal has the right to control the manner and method in which an agent performs work for her, and (2) an agent has the power to subject a principal to personal liability. The existence of an agent/principal relationship rests on factual underpinnings and cannot be determined on a motion to dismiss. Whether an agency is created depends upon the existence of required factual elements: the manifestation by a principal that an agent shall act for him, an agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking.

Business & Corporate Entities: Agency: Duties & Liabilities: Third Party Responsibilities & Rights

A third party may be held liable to a principal for a breach of fiduciary duty by another person if the third party: (1) knowingly participated in or induced the breach of duty, and (2) knowingly accepted the benefits resulting from the breach of duty.

Legal Ethics: Unauthorized Practice of Law

Illinois law does not recognize a cause of action for the unauthorized practice of law unless a plaintiff alleged that a defendant either represented himself as an attorney, or negligently provided services, thereby causing damages. A plaintiff can maintain a private cause of action for damages against a non-attorney for the unauthorized and negligent practice of law.

Legal Ethics: Unauthorized Practice of Law

The drawing or filling in of blanks on deeds, mortgages or other legal instruments subsequently executed requires the peculiar skill of a lawyer and constitutes the practice of law. However, an exception to the general rule allows persons to engage in the activities that otherwise might constitute practicing law as long as the activities are incidental to the corporations main business, and as long as a person does not advise others for consideration, that this or that is the law, or that this form or that is the proper form to be used in a certain transaction. Illinois law interpreting the exception draw a distinction between cases where non-lawyers provide legal advice and services to third-parties and cases where non-lawyers perform services intended to benefit themselves. A mortgage company does not engage in the unauthorized practice of law by preparing mortgages, where it does not provide legal advice to a mortgagor or prohibit a mortgagor from retaining an attorney. Merely preparing mortgage documents without more does not constitute the practice of law. Corporations can act for their own benefit as long as they do not hold themselves out as legal advisor or representative to anyone else.

COUNSEL: For TIM A MICHALOWSKI, MERI C MICHALOWSKI, plaintiffs: Cathleen M. Combs, Daniel A. Edelman, James O. Lattuner, Michelle R. Teggelaar, Edelman, Combs & Lattuner, Chicago, IL.

For FLAGSTAR BANK, FSB, defendant: Edward C. Fitzpatrick, Thomas Justin Cunningham, John F. Kloecker, Lord, Bissell & Brook, Chicago, IL.

For CMC FINANCIAL, LLC., defendant: Brian Todd Garelli, Garelli & Associates, P.C., Elmhurst, IL.

JUDGES: JAMES F. HOLDERMAN, United States District Judge.

OPINIONBY: JAMES F. HOLDERMAN

OPINION: MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

On October 9, 2001, plaintiffs Tim A. Michalowski and Meri C. Michalowski (the "Michalowskis") filed a ten-count putative class action second amended complaint against defendants Flagstar Bank, FSB ("Flagstar") and CMC Financial, LLC ("CMC"). The second amended complaint purports to allege a class claim for violation of the Real Estate Settlement

Procedures Act ("RESPA"), 12 U.S.C. § 2607(a), against[*2] Flagstar and CMC in count I, a class claim for violation of the Illinois Consumer Fraud Act, 815 ILCS 505/2 ("ICFA"), against Flagstar and CMC in count II, a class claim for breach of fiduciary duty against CMC in count III, a class claim for inducing breach of fiduciary duty against Flagstar in count IV, a class consumer fraud claim against Flagstar in count V, a class claim for restitution against Flagstar in count VI, a claim against CMC for violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1638, against CMC in count VII, a common law claim for unauthorized practice law against Flagstar and CMC in count VIII, a class consumer fraud claim under ICFA against Flagstar and CMC in count IX, and finally, a claim for restitution against Flagstar and CMC in count X.

On November 1, 2002, Flagstar filed a motion to dismiss counts I, II, IV, V, VI, and VIII -X of the second amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and on November 27, 2001, CMC filed a motion to dismiss counts I-III and VII-X of the second amended complaint also pursuant to Rule 12(b)(6). For the following reasons, Flagstar's and CMC's motions to dismiss are GRANTED[*3] in part and DENIED in part. Flagstar's and CMC's motions to dismiss are denied as to counts I, II, III, and IV, and granted as to counts V, VI, VII, VIII, IX, and X. Accordingly, counts V, VI, VII, VIII, IX, and X are dismissed with prejudice. Plaintiff has until February 7, 2002 to file a second amended complaint consistent with this opinion.

STATEMENT OF FACTS n1

n1 In considering the merits of a motion made pursuant to Federal Rule of Civil Procedure 12(b)(6), the well-plead allegations of the complaint must be accepted as true. *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319 (7th Cir. 1997). Accordingly, the facts alleged in the Michalowskis' second amended complaint are taken as true and set-out in this opinion.

The Michalowskis are Illinois residents who obtained a mortgage loan of \$ 127,050 to purchase a home in Ingleside, Illinois on June 7, 2001. The mortgage loan was arranged for the Michalowskis by CMC, a mortgage broker. At the time of the closing, CMC had already sold the[*4] loan to Flagstar. Prior to the closing, the Michalowskis received a loan commitment dated April 9, 2001, a preliminary Federal Truth-in-Lending

Disclosure Statement dated March 15, 2001, and a good faith estimate dated March 15, 2001, all of which specified a 7.125% interest rate for the Michalowskis' loan. At the closing, on June 7, 2001, the Michalowskis were provided a note by CMC for the amount of their loan with an interest rate of 7.375%, two different Truth-in-Lending disclosure statements both dated June 7, 2001, a notice that the loan was being assigned to Flagstar, and a HUD-1 settlement statement that listed, among other things, a \$ 400 commitment fee and a \$ 400 processing fee paid to CMC by the Michalowskis, a \$ 100 tax service fee paid to Flagstar by CMC, a yield spread premium of \$ 794.06 paid to CMC from Flagstar, a \$ 300 underwriting fee paid to Flagstar by the Michalowskis, and a \$ 110 document preparation fee imposed by Flagstar but remitted to D.P.S., a third party document preparation service. All of the above listed fees were paid from the loan proceeds.

Yield spread premiums are payments made by a mortgage lender to a mortgage broker as compensation for negotiating[*5] a loan with a borrower. Typically, the rate of compensation is tied to the size of the loan, the interest rate the loan carries, and the time the loan closes. The higher the interest rate on the loan, the higher the yield spread premium for the broker. A yield spread premium is calculated based upon the difference between the interest rate at which the broker originates the loan and the par, or market, rate that the lender establishes. A yield spread premium allows a borrower to pay some or all of the up-front settlement costs for the loan over the life of the mortgage through a higher interest rate as opposed to paying the settlement costs from the loan proceeds. Because the mortgage that carries a higher interest rate can be sold by the lender to an investor at a higher price, the lender, in turn, pays the broker an amount reflective of this price difference. In this case, Flagstar paid CMC a .06% yield spread premium on the Michalowskis' mortgage loan based upon the .25% increase in the interest rate from 7.125% to 7.375%. The effect of increasing the Michalowskis' mortgage loan interest rate by .25% on the Michalowskis' 30-year mortgage was to increase the finance charge by more[*6] than \$ 6 per \$ 100 of amount financed. For a \$ 123,250 loan, this would result in over \$ 5,000 in extra finance charges. At the time of the closing, the Michalowskis did not understand the effect of the yield spread premium.

The tax service fee of \$ 100 charged by Flagstar was for a contract to have the real estate tax records examined each year to make sure taxes have been paid and properly credited to the Michalowskis' property. Such a contract can be purchased for \$ 48. The \$ 110 document prepa-

ration fee charged by Flagstar but remitted to D.P.S. was the expense for filling out the note, the mortgage, and other related documents. The document preparation services were not performed by an attorney and D.P.S. is not a professional corporation consisting of attorneys authorized to practice law. It is the standard practice of CMC and Flagstar to charge a document preparation fee comparable to \$ 110 when CMC or Flagstar arranges a loan.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows this court to dismiss a complaint that fails to state a claim upon which relief may be granted. In considering the merits of a motion made pursuant to Rule 12(b)(6), the well-plead[*7] allegations of the complaint must be accepted as true. *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319 (7th Cir. 1997). In addition, all ambiguities will be construed in favor of the plaintiff. *Kelley v. Crosfield Catalysts*, 135 F.3d 1202, 1205 (7th Cir. 1998). A court generally should only dismiss a complaint where it is clear that no relief could be granted with the allegations. *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). Additional facts submitted outside of the pleadings will be explicitly excluded and not considered, except those documents that are attached to the motion to dismiss, are referred to in the complaint and are central to the plaintiff's claims. *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998).

ANALYSIS

I. Federal Claims

A. Count I - RESPA

Count I of the Michalowskis' second amended complaint alleges that Flagstar's payment of the yield spread premium to CMC on June 7, 2001 from the Michalowskis' mortgage loan proceeds violated the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601[*8] et seq., because the yield spread premium constituted an illegal fee received solely for CMC's referral of business and in exchange for CMC's success in persuading the Michalowskis to sign on to a loan at a higher interest rate than the base interest rate. Congress enacted RESPA to protect home buyers from "unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). Specifically, § 2607(a) provides:

kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a).

However, even if it is established that a referral fee has been paid, however, there is no violation of RESPA if the payment is compensation "for goods or facilities actually furnished or for services actually performed . . . so long as a disclosure is made of the existence of such an arrangement to the person being referred . . ." 12 U.S.C. § 2607[*9] (c)(2). In other words, it is perfectly legal under RESPA for a lender to pay a mortgage broker for services the broker has performed in connection with a real estate transaction but it is illegal for a lender to pay a broker a referral fee for sending business the lender's way.

The legality of yield spread premium payments under the RESPA has been the subject of several federal lawsuits across the country. See, e.g., *Vargas v. Universal Mortgage Corp.*, 2001 U.S. Dist. LEXIS 6696, 2001 WL 558045 (N.D. Ill., May 21, 2001); *Golon v. Ohio Savs. Bank*, 1999 U.S. Dist. LEXIS 4142, 1999 WL 184401 (N.D. Ill. Mar. 29, 1999); *DeLeon v. Beneficial Constr. Co.*, 998 F. Supp. 859 (N.D. Ill. 1998); *Hastings v. Fidelity Mortgage Decisions Corp.*, 984 F. Supp. 600 (N.D. Ill. 1997). See also *Marbury v. Colonial Mortgage Co.*, 2001 U.S. Dist. LEXIS 1632, 2001 WL 135719 (M.D. Ala. Jan. 12, 2001); *Schmitz v. Aegis Mortgage Corp.*, 48 F. Supp.2d 877 (D. Minn. 1999); *Potchin v. Prudential Home Mortgage Co.*, 1999 U.S. Dist. LEXIS 22480, 1999 WL 1814612 (E.D.N.Y. Nov. 12, 1999);. The general consensus, and the view endorsed by the Department of Housing and Urban Development ("HUD") is that yield spread[*10] premium payments are not per se illegal, but that certain unscrupulous lenders use the yield spread premium payment improperly as a means to compensate brokers for originating loans with higher interest rates. A 1999 HUD regulation suggests a two-part test to determine whether a yield spread premium is an illegal referral fee or a permissible fee for service rendered. See Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (1999) ("1999-1 Policy Statement"). This two-part test was confirmed by a 2001 HUD policy statement issued to clarify HUD's 1999-1 Policy Statement. See Real Estate Settlement Procedures Act (RESPA) Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed.

No person shall give and no person shall accept any fee,

Reg. 53052 (2001). Under the two-step framework for analyzing the legality of lender payments to brokers set forth in the 1999-1 and 2001-1 Policy Statements, this court is required to first consider "whether goods or facilities were actually furnished or services[*11] were actually performed for the compensation paid" and second, "whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." See 1999-1 Policy Statement, 64 *Fed. Reg. at 10084*; 2001-1 Policy Statement, 66 *Fed. Reg. at 53054*. The yield spread premium payment is to be factored in as one element of the broker's "total compensation" when evaluating the overall reasonableness of the compensation and the framework for evaluating the reasonableness of the total compensation for a particular transaction should be considered "in relation to price structures and practices in similar transactions and in similar markets." 1999-1 Policy Statement, 64 *Fed. Reg. at 10084*; 2001-1 Policy Statement, 66 *Fed. Reg. at 53055*.

In support of their motions to dismiss, CMC and Flagstar argue that the Michalowskis allege no more than the existence of a yield spread premium payment and a conclusory assertion that the premium was in excess of reasonable compensation for services provided. CMC and Flagstar maintain that the Michalowskis fail to allege any facts[*12] regarding the relation between the total compensation provided to CMC and the price structures and practices in similar transactions and similar markets as required under HUD's 1999-1 and 2001-1 Policy Statements. In the second amended complaint, the Michalowskis allege that the yield spread premium paid by Flagstar to CMC was unreasonable and was simply for the referral of business, not for compensation for goods, facilities, or services performed, as CMC was already compensated for said functions by the payment of \$ 800 out of the loan proceeds for the commitment and processing fees. This court finds that while the Michalowskis will ultimately be required to establish that the yield spread premium was paid merely for the referral of business and was not compensation for services performed by CMC, this is a factual dispute for which the resolution may depend on many factors such as the interest rate on the Michalowskis' mortgage, Michalowskis' credit histories, the number and kind of services CMC performed for Flagstar, whether CMC gave the Michalowskis the opportunity to consider products from different lenders, and whether CMC would receive the same compensation regardless of which[*13] lender's products were ultimately selected. See *Vargas v. Universal Mortgage Corp.*, 2001 U.S. Dist. LEXIS 6696, 2001 WL 558045 at *2 (N.D. Ill., May 21, 2001) (listing relevant factors). Because the legality of a yield

spread premium is highly dependent on the facts of each case and because this court finds the Michalowskis have plead their count I claim in a manner sufficient to put CMC and Flagstar on notice of the RESPA claim, the motion to dismiss the count I RESPA claim cannot be granted.

B. Count VII - TILA

Count VII alleges that CMC violated the Truth In Lending Act ("TILA"), 15 U.S.C. § 1638, and Regulation Z, 12 C.F.R. §§ 226.17-226.18, by issuing two TILA disclosures at the closing of the mortgage loan transaction without specifying which was the operative statement. Both of the relevant TILA statements the Michalowskis received at the closing are dated June 7, 2001 (Compl. Exs. G, H.). However, one of the TILA statements is marked as an estimate as provided for at the bottom of the form, (Compl. Ex. H), while the other TILA statement is not marked as an estimate. (Compl. Ex. G.) In the statement that is marked as an estimate, the box next[*14] to the label "means an estimate" is checked, as is the box next to the label "all dates and numerical disclosures except the late payment disclosures are estimates." (Compl. Ex. H). The Michalowskis only signed one statement, the statement that was not marked as an estimate, which consequently is the only operative statement. This court finds that CMC did not violate the TILA by providing the Michalowskis with one statement marked as an estimate and one statement signed as the operative TILA disclosure statement. Accordingly, this court dismisses count VII for failure to state a claim.

II. State Law Claims

As a preliminary matter, this court will address Flagstar's argument that because Flagstar is a federally chartered savings bank regulated by the Office of Thrift Supervision ("OTS") under the Home Owners Loan Act ("HOLA"), all of the Michalowskis' state law claims against Flagstar are pre-empted. While Flagstar is correct in noting that part 560 of the OTS regulations entitled "Lending and Investment" provides that "OTS hereby occupies the entire field of lending regulation for federal savings associations," 12 C.F.R. § 560.2(a), this court[*15] finds that the Michalowskis' state law claims are not brought under state laws that "regulate lending." All of the state law claims allege fraudulent or tortious conduct by Flagstar. The Michalowskis do not maintain that the actual fees Flagstar charged are unlawful; rather, the Michalowskis challenge the methods through which Flagstar collected the fees, arguing that Flagstar knowingly overcharged

and deceived the Michalowskis. Therefore, this court will not dismiss all of the Michalowskis' state law claims against Flagstar as pre-empted. The state law claims are discussed below.

A. Counts II, V, VI - ICFA

Count II alleges that CMC and Flagstar charged the Michalowskis and the putative class members a yield spread premium merely for the referral of business without providing full and complete disclosure of all material facts relating to this transaction, thereby receiving amounts in excess of reasonable compensation for services provided in violation of the Illinois Consumer Fraud Act ("ICFA"), 815 ILCS § 505/1. The Michalowskis contend that the conduct of CMC and Flagstar was deliberate, oppressive, corrupt and dishonest. Count V alleges that Flagstar engaged in unfair[*16] and deceptive acts and practices by charging the Michalowskis and the putative class members \$ 100 for a tax service fee that could be had for \$ 48, failing to identify the person to whom the \$ 100 was disbursed, keeping or receiving back part of the \$ 100 and stating on the HUD-1 form that the \$ 100 was paid to Flagstar.

To show a violation of ICFA, a plaintiff must allege (1) a deceptive act or practice by defendants, (2) defendants' intent that plaintiff rely on the deception, and (3) that the deception occurred in the course of conduct involving trade or commerce. See *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 501 675 N.E.2d 584, 593, 221 Ill. Dec. 389 (1996). Federal Rule of Civil Procedure 9(b) provides that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). The heightened pleading standard imposed by Rule 9(b) applies to claims arising under the ICFA. *Petri v. Gatlin*, 997 F. Supp. 956, 973 (N.D. Ill.1997); *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 501, 675 N.E.2d 584, 593, 221 Ill. Dec. 389 (Ill.1996). The Michalowskis, [*17]then, must "identify . . . the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated." *Uni Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir.1992). In other words, the Michalowskis must plead the who, what, when, and where of the alleged fraud. *Id.*

CMC and Flagstar argue that the Michalowskis fail to plead counts II and V with the necessary particularity. The purpose of Rule 9(b) is to "ensure that the party accused of fraud, a matter implying some degree of moral turpitude and often involving a 'wide variety of potential

conduct,' is given adequate notice of the specific activity that the plaintiff claims constituted the fraud so that the accused party may file an effective responsive pleading." *Lachmund v. ADM Investor Services, Inc.*, 191 F.3d 777, 783 (7th Cir. 1999). Here, the Michalowskis are not challenging a wide variety of potential conduct by CMC and Flagstar; instead, their allegations are limited to two very specific and distinct charges, the yield spread premium payment in count II and the tax service fee in count V. This[*18] court believes that the Michalowskis have adequately put CMC and Flagstar on notice as to what specific activities are alleged to be fraud.

CMC and Flagstar maintain next that counts II and V are nothing more than breach of contract claims, not valid claims under ICFA. Not every breach of contract constitutes a cause of action under ICFA. "Courts have consistently resisted attempts by litigants to portray otherwise ordinary breach of contract claims as causes of action under the Act." *Lake County Grading Co. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 452, 458, 654 N.E.2d 1109, 1115, 211 Ill. Dec. 299 (2d Dist. 1995). Count II alleges that Flagstar paid CMC a referral fee to raise the Michalowskis' mortgage loan interest rate. Flagstar and CMC argue that the yield spread premium was disclosed on the HUD-1 settlement statement and signed by the Michalowskis and that therefore any payment of the premium is at most a breach of contract claim. This court disagrees. The Michalowskis do not assert that Flagstar and CMC failed to uphold their part of the contract with regard to the yield spread premium payment. The alleged fraudulent activity alleged was not the[*19] amount of the yield spread premium, but rather Flagstar's alleged deceptive act of paying CMC solely for arranging a higher interest rate on the Michalowskis' loan. Accordingly, this court finds that count II states a claim for a violation of ICFA.

As to count V, however, this court finds that the Michalowskis have simply alleged a breach of contract claim, not a claim under ICFA. Count V alleges that Flagstar charged the Michalowskis and others a \$ 100 tax service fee that could be had for \$ 48. The relevant contracts in this case include the note and the mortgage. (Compl. Ex. E, F.) The mortgage specifically authorizes the tax service charge the Michalowskis complain of, stating that "Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan." (Compl. Ex F at P 4.) The note and the mortgage both provide that in the event the bank charges a fee in excess of that permitted under the law, that the overcharge will be reduced to the permitted limit and

that any sums collected in excess will be refunded to the borrower. (Compl. Exs. E at P 5, F at P14.) The Michalowskis argue that a business[*20] which imposes charges in excess of those permitted by consumer contracts engage in an unfair and deceptive practice. The core of the Michalowskis argument that Flagstar charged in excess of that permitted in the contract rests on the fact that the contract address the tax service charge. The contracts in this case specifically authorize the charging of the tax service fee and provides the remedy in the event the Michalowskis establish they were overcharged. Further, the allegation that Flagstar has also deceptively overcharged an unknown number of similarly situated "others" does not create an ICFA claim; it is merely an allegation that Flagstar has breached similar contracts with various other borrowers in the same position as the Michalowskis. Accordingly, this court dismisses count V of the second amended complaint.

Count VI is entitled "Restitution" and is based upon an allegation that Flagstar unjustly enriched itself by overcharging the Michalowskis the tax service fee. Since the remedy of restitution for unjust enrichment is not available in cases where the claim is governed by a contract. See *F.H. Prince & Co. v. Towers Fin. Corp.*, 275 Ill. App. 3d 792, 804-05, 656 N.E.2d 142, 151, 211 Ill. Dec. 950 (1st Dist. 1995)[*21] ("Since the doctrine of unjust enrichment presents an implied or quasi-contract claim, where there is a specific contract which governs the relationship between the parties, the doctrine has no application."). Because this court finds that the alleged overcharging of the tax service fee in this case is governed by contract, this court appropriately dismisses count VI.

B. Counts III and IV - Fiduciary Duty

Count III alleges that CMC, as the Michalowskis' mortgage broker and agent, breached its fiduciary duty to the Michalowskis by receiving money from Flagstar for increasing the loan interest rate to the Michalowskis' detriment without full disclosure of all material facts relating to this transaction. CMC maintains that the Michalowskis have failed to sufficiently plead the existence of an agency relationship. A fiduciary duty is "the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith--in fact to treat the principal as well as the agent would treat himself." *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 21, 653 N.E.2d 968, 975, 210 Ill. Dec. 773 (2d Dist. 1995). Although courts may find a fiduciary relationship [*22] when one person solicits another to repose trust in his expertise, "the fact that one party trusts the other is insufficient [to create a fiduciary relationship].

We trust most people with whom we choose to do business." Id. An agency relationship has two components: 1) the principal has the right to control the manner and method in which the agent performs work for her, and 2) the agent has the power to subject the principal to personal liability. *Knapp v. Hill*, 276 Ill. App. 3d 376, 380, 657 N.E.2d 1068, 1071, 212 Ill. Dec. 723 (1st Dist. 1995). While a mortgage broker is not always a borrower's agent, this court will not dismiss count III for failure to adequately plead agency. The existence of an agent/principal relationship rests on factual underpinnings and cannot be determined on a motion to dismiss. See *Hastings v. Fidelity Mortgage Decisions Corp.*, 984 F. Supp. 600, 614 (N.D. Ill. 1997) (citing Restatement (Second) of Agency § 1 (1957) (Whether an agency is created "depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and [*23]the understanding of the parties that the principal is to be in control of the undertaking.")). This court finds that the Michalowskis have adequately alleged a breach of fiduciary duty in count III.

The Michalowskis allege in Count IV that Flagstar unlawfully induced CMC to breach its fiduciary duty to the Michalowskis in return for the yield spread payment. A third party may be held liable to a principal for a breach of fiduciary duty by another person if the third party: (1) knowingly participated in or induced the breach of duty, and (2) knowingly accepted the benefits resulting from the breach of duty. See *Hastings v. Fidelity Mortgage Decisions Corp.*, 984 F. Supp. 600, 614-15 (N.D. Ill. 1997); *Regnery v. Meyers*, 287 Ill. App. 3d 354, 679 N.E.2d 74, 80, 223 Ill. Dec. 130 (1997). The Michalowskis allege that Flagstar provided CMC with rate sheets which indicated the yield spread premium it would pay to CMC if the interest rate CMC obtained on the mortgage was above the par rate and that the yield spread premium Flagstar ultimately paid to CMC was linked to the actual increase in the Michalowskis' interest rate. This court finds that count IV adequately[*24] pleads a claim for inducement of breach of fiduciary duty to defeat a motion to dismiss.

C. Counts VIII, IX, X - Unauthorized Practice of Law

In connection with the mortgage loan transaction, the Michalowskis were charged a document preparation fee of \$ 110 for the filling out of the note, mortgage and related documents. The Michalowskis allege that Flagstar decided to impose the charge, CMC passed the charge on to the Michalowskis, and a third party document preparation services company, D.P.S., actually performed the work and received the \$ 110. Count VIII alleges that

Flagstar engaged in the unauthorized practice of law by charging a document preparation fee relating to the preparation of the note, mortgage, and related documents by D.P.S., a non-lawyer. Count IX alleges that Flagstar violated ICFA by charging the document preparation fee and failing to disclose that the services were not being performed by a lawyer. Finally, in count X, the Michalowskis seek restitution for the document preparation charge.

Illinois law on the "unauthorized practice of law" is not extensive. Illinois courts have not recognized a cause of action for the "unauthorized practice of law" unless[*25] the plaintiff alleged that defendants either had represented themselves as attorneys, or negligently provided services, thereby causing damages. See *Torres v. Fiol*, 110 Ill. App. 3d 9, 11-12, 441 N.E.2d 1300, 1301, 65 Ill. Dec. 786 (1st Dist. 1982) (plaintiffs could maintain a private cause of action for damages against a non-attorney for the unauthorized and negligent practice of law); *Rathke v. Lidisky*, 59 Ill. App. 3d 560, 562, 375 N.E.2d 871, 872-73, 16 Ill. Dec. 764 (5th Dist. 1978) (affirming dismissal of the unauthorized practice of law count because plaintiff did not allege negligence or that any of the defendants represented themselves to be attorneys such that they would be held to a higher duty of care). In this case, this court notes first that the Michalowskis do not allege that Flagstar represented itself to be an attorney, nor do the Michalowskis allege that Flagstar negligently performed any legal service or mishandled the preparation of the loan documents. In fact, the Michalowskis do not even allege that Flagstar prepared the documents. The document preparation fee was remitted to a third party, D.P.S., a document preparation services[*26] company. Moreover, the Michalowskis do not allege that they suffered any damages from the actual preparation of the note and mortgage beyond the charging of the document preparation fee.

In support of their argument, the Michalowskis cite *Chicago Bar Ass'n v. Quinlan and Tyson, Inc.* for the general rule that "the drawing or filling in of blanks on deeds, mortgages or other legal instruments subsequently executed requires the peculiar skill of a lawyer and constitutes the practice of law." 34 Ill.2d 116, 122, 214 N.E.2d 771, 774 (1966). However, the Illinois Supreme Court in *Quinlan and Tyson*, suggested an exception to the general rule stated above that allows persons to engage in the activities that otherwise might constitute "practicing law" as long as the activities are incidental to the corporations main business, and as long as the persons does not "advise[] others for consideration, that this or that is the law, or that this form or that is the proper form to be used in a certain transaction"

See *id.* Illinois courts interpreting this exception have drawn a distinction between cases where non-lawyers provide legal advice and services to third-parties[*27] and cases where non-lawyers perform services intended to benefit themselves. In *First Federal Savs. and Loan Assoc. v. Sadnick*, the Illinois court held that defendant First Federal Savings and Loan Association did not engage in the unauthorized practice of law in preparing mortgages, noting that the defendant did not provide legal advice to the mortgagors or prohibit the mortgagors from retaining an attorney, and concluding that the preparation of the mortgage was to benefit the defendant. 162 Ill. App. 3d 581, 583, 515 N.E.2d 1354, 1356, 114 Ill. Dec. 83 (3d Dist. 1987). The Sadnick court concluded that "First Federal was merely preparing the mortgage documents, this without more does not constitute the practice of law." *Id.*; see also *Johnson v. Pistakee Highlands Comm. Assoc.*, 72 Ill. App. 3d 402, 404, 390 N.E.2d 640, 642, 28 Ill. Dec. 473 (2d Dist. 1979) (holding that corporations could act for their own benefit as long as they do not hold themselves out as legal advisor or representative to anyone else).

This court finds that the Michalowskis have not stated a claim under Illinois law for the unauthorized practice of law. First, the Michalowskis[*28] do not allege that Flagstar negligently prepared the mortgage documents and caused damages. Even if negligence and damages were properly alleged, this court finds that Flagstar was preparing the mortgage and note for its own benefit and incidental to Flagstar's main business, and that Flagstar did not hold itself out to be a legal advisor or representative. Accordingly, count VIII is dismissed for failure to state a claim. This court likewise dismisses count IX because the mere allegation that Flagstar did not disclose the fact that the document preparation services were not being performed by a lawyer, when there is no claim for the unauthorized practice of law, cannot constitute any deceptive act or practice for purposes of the ICFA. Finally, because the preparation of the documents was not the unauthorized practice of law, this court finds that the charging of the document preparation services was not inequitable conduct and therefore this court also dismisses count X, which seeks restitution for document preparation charge.

CONCLUSION

For all the above stated reasons, CMC's and Flagstar's motions to dismiss are GRANTED in part as to counts V, VI, VII, VIII, IX, and X, and[*29] DENIED in part as to counts I, II, III, and IV. Accordingly, counts V, VI, VII, VIII, IX and X are dismissed with prejudice for failure to state a claim. The Michalowskis are or-

dered to file an amended complaint consistent with this opinion by February 7, 2002. CMC's and Flagstar's answer is to be filed on or before February 18, 2002. The parties are urged to discuss settlement, conference pursuant to Rule 26(f), file a joint Form 35 by February 22, 2002, and report on the status of the case at 9:00 a.m. on February 26, 2002.

ENTER:

JAMES F. HOLDERMAN

United States District Judge

DATE: January 24, 2002